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### Recourse Claims between Carriers – another obstacle to intermodality?

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#### Abstract:

The applicable legal regime for recourse and contribution claims between carriers is far from straightforward. It entails a mix of contract terms, domestic law and mandatory carriage convention provisions, accordingly resulting in a complex mixture of provisions and, in particular, of limitation rules. An example of their interaction is given by the English Court of Appeal in *South West SHA v Bay Island Voyages* where the court had to decide on limitation of a contribution claim for an incident falling under the Athens Convention for the carriage of passengers and their luggage by sea. The case illustrates the critical interaction between convention rules and domestic law, which may differ in each case, depending on the applicable convention regime. The result is a complicated web of provisions and hierarchies offering a multitude of pitfalls for freight forwarders and carriers alike. This effect is showcased more broadly under English law where the domestic contribution act and the convention regimes as implemented in the different jurisdictions within the UK provide for an uneasy relationship. After detailed analysis of the current framework, which is argued to be inadequate, reform suggestions to implementing legislation of these international instruments are made, in order to limit the uncertainty created by their interaction with the Civil Liability (Contribution) Act, which purports to supersede any other rules providing for contribution.

#### 1. Introduction

Many carriage or freight forwarding contracts are not (fully) performed by the contracting party and other persons and carriers may transport the goods or be involved at some stage. Where loss occurs there are likely to be several parties potentially liable to the cargo claimant, whether in contract, tort, bailment or otherwise. If one of the liable parties compensates the claimant, he will want to be able to take recourse from the others involved or from the person who had caused the damage. Most international carriage conventions provide some rules on recourse rights between carriers or on interaction of their liability where several carriers are involved in the transportation. Contractual provisions between carriers and performing parties may contain indemnity or contribution clauses and English domestic law, particularly in the form of the Civil Liability (Contribution) Act 1978 determines contribution and apportionment of liability between several persons liable in respect of the same damage. How these regimes interact differs according to the convention applicable in its reach of provisions on multiple carriers, whether it leaves scope for domestic law on contribution and reimbursement to be applied and how the convention is implemented into the national legal framework. As will be seen, even where the convention purports not to regulate recourse claims, convention rules on limitation of time for suit may still impinge on contribution claims<sup>1</sup> under English

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<sup>1</sup> A claim for contribution means a claim by a person (the contribution claimant) to recover from another (the contribution defendant) all or part of the amount for which the contribution claimant has become liable to a third party (the original claimant or claimant in the claim underlying the contribution claim). A claim for indemnity however would premise that recovery is sought for the full amount. (See the wording used Civil Liability (Contribution) Act 1978 s2(3) “..., or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.”, Glossary to the Civil Procedure Rules 1998 and see also Takahashi, *Claims for Contribution and Reimbursement in an International Context; Conflict-of-Laws Dimensions of Third Party Procedure*, (Oxford, 2000) (hereafter Takahashi) pp 3-4 and Mitchell, *The Law of*

law. The chapter examines a number of uncertainties within the interaction of the regimes and concludes that this is another area where the multiplicity of convention regimes, their lack of harmonisation and uncoordinated implementation into domestic law may cause difficulties to carriers and freight forwarders who have to apply this multitude, heeding the crucial differences, or lose their right of recourse.

To set the scene this chapter firstly gives a short introduction to the English law of contribution and reimbursement and illustrates the interaction of the relevant Act with carriage conventions on the basis of a recent case in the context of the Athens Convention on the carriage of passengers<sup>2</sup>. Thereafter a brief overview over the various cargo transport convention's provisions on recourse claims and multiple carrier rules is provided before engaging in a deeper examination of these rules with an analysis of their, at times, fraught interaction with the relevant domestic law in form of the English Civil Liability (Contribution) Act 1978. As a result and in conclusion, reform suggestions are made to implementing legislation of the various international carriage instruments to facilitate the conventions' smooth application in this context.

### 2. The Civil Liability (Contribution) Act 1978

English law of contribution and reimbursement is currently in a fragmented state and regulated at common law, in equity and in parts nowadays also by statute.<sup>3</sup> The key statute on contribution and recourse is the Civil Liability (Contribution) Act 1978.<sup>4</sup> Despite the seemingly narrow name, the Act allows for recovery of any amount between a contribution of only a part up to a full indemnity, i.e. a 100% contribution.<sup>5</sup> As the Act may impact on recourse claims between carriers it warrants a short introduction and discussion before setting it into context with the pertinent implementations of international carriage instruments.

The 1978 Act was to make new provision for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage, and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage.<sup>6</sup> It was to ensure that the contribution defendant would not be unjustly enriched where the defendant's liability to a third party had been discharged by a claimant who had been liable to the same third party.<sup>7</sup> The Act was however not intended to interfere with existing rights of indemnity or

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*Contribution and Reimbursement* (Oxford, 2003) (hereafter Mitchell), para 1.14. A claim for contribution is often called a claim for reimbursement when made pursuant to a contract; however since such a claim is usually for full recovery the term contribution is seldom found in this context (Takahashi p.4). In this chapter the meaning of claim for recourse or reimbursement is not strictly restricted to being founded on a contractual basis only.

<sup>2</sup> The Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens) 1974 (Athens Convention)

<sup>3</sup> See Mitchell para 1.18ff., Bugden, Lamont-Black, *Goods in Transit* (3<sup>rd</sup> edn, Sweet & Maxwell, 2013) (hereafter Bugden) ch.11 on Restitution. For a discussion of the legal basis of claims for contribution from a domestic and international viewpoint, see Takahashi pp.7 ff. He categorises them as: a) contractual claims for contribution pursuant to an undertaking to reimburse the claimant, b) restitutionary claims for contribution, c) statutory claims for contribution (including those under the Contribution Act), d) claims for contribution by way of subrogation, e) claims for contribution by way of a claim for compensation for the damage suffered in the form of payment made to another, whether in tort or contract, and f) in civil law claims for contribution in *negotiorum gestio*.

<sup>4</sup> For a general introduction of the Act see also Dugdale, "Civil Liability (Contribution) Act 1978", (1979) 42 MLR 182, Mitchell para 4.20 ff., Bugden paras 11-013 ff. and Halsbury's Laws of England, Damages (Vol 29 (2014)), Contribution between Wrongoers, paras 620 ff., Halsbury's Laws of England/Restitution (Vol 88 (2012)) Discharge of Debts, paras 481-3 and Halsbury's Laws of England, Tort (Vol 97 (2015)), The General Law of Tort, Joint and Several Tortfeasors, paras 450 ff.

<sup>5</sup> See Mitchell, para 4.37 n.128 quoting Lord Scarman in *Hansard*, HL (series 5) vol 395, col 247 (18 July 1978).

<sup>6</sup> *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [37] Lord Hope.

<sup>7</sup> See *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [76], Lord Hobhouse and Bugden paras 11-011 ff. The statute creates a cause of action in its own right; see Halsbury's Law of England, Damages (Vol 29 (2014)) Contribution between Wrongoers, para 620, no.8.

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the law of contribution relating to joint liability in debt, but to cover only joint liability for (the same) damage.<sup>8</sup>

Thus, under section 1 of the Contribution Act “any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).” The right to contribution applies even where the other person's liability arises from a different cause of action.<sup>9</sup> This was an extension of the Act beyond the former and superseded Law Reform (Married Women and Tortfeasors) Act 1935, which only gave a right to contribution between persons who were liable for the same damage in tort. While liability has to be for the same damage and not merely substantially for materially similar damage<sup>10</sup>, it seems that it does not have to be founded merely on wrongdoing alone, so that a claim for restitution and one for damages could give rise to compensation within section 1 of the Contribution Act, although this is not undisputed.<sup>11</sup>

In principle, a person is liable to make contribution only if and to the extent that he was liable to the person who suffered the damage, although there are several points to consider:<sup>12</sup>

The Act stipulates that a judgment given in any action brought in any part of the UK by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under section 1 of the Act shall be conclusive in the proceedings for contribution as to the any issue determined by that judgment in favour of the person from whom the contribution is sought.<sup>13</sup> Further, contribution can only be claimed from a person whose liability in respect of the damage has been or could be established in an action against him in England and Wales by or on behalf of the person who suffered the damage, although the law applicable to such claim does not have to be English law.<sup>14</sup> This therefore curtails, possibly severely, the application of the Act only to contribution defendants who could have been sued for the underlying claim for damages in the English and Welsh courts.

Under section 1(3) of the Act, liability in contribution remains, irrespective of expiry of a time bar of the underlying action by the person who suffered damage against the contribution defendant, so long, as the right on which the claim is based is still in existence. This was a change from previous

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<sup>8</sup> See *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [37 - 41], Lord Hope and see Law Commission Report on Law of Contract Report on Contribution (LAW COM. No.79) (1977) (HC 181), para 26 ff; Law Com Working Paper No 59 (1975) “Contribution” at paras 45(b) and 20 and Mitchell, paras 1.18, 4.20 ff., esp.4.35 ff. The bill was drafted so as to give effect, with certain modifications, to the report and recommendations of the Law Commission (Lord Scarman, Hansard, HL, series5) vol 395, col 25 (18 July1978); the report, as interpretative aid, can thus give relevant insights into the intention of the draftsmen of the Act.

<sup>9</sup> Contribution Act s 6(1): “...whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise”; *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [41] Lord Hope and Mitchell para 4.22 ff.

<sup>10</sup> *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 (where it was held that damages for delay in construction against builders and damages for negligently certifying an extension of time against architects was held not to be the same damage) and Beale, *Chitty on Contracts, Vol I, General Principles* (Sweet & Maxwell, 31<sup>st</sup> edn, 2012) para 17-030.

<sup>11</sup> See *Friends Provident Life Office v Hillyer Parker May and Rowden* [1995] 4 All E.R. 260 CA; cf. obiter dicta of Lord Steyn in *Royal Brompton Hospital National Health Service Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [33] and discussion thereof in Mitchell paras 4.45 ff.; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487; [2004] 2 Lloyd's Rep. 319 at [77] Clarke LJ and at [87] Sedley LJ and *Charter Plc v City Index Ltd* [2007] EWCA Civ 1382; [2008] 2 W.L.R. 950. See also Halsbury's Laws of England, Restitution (Vol 88 (2012)) Discharge of Debts, Contribution, para 482 and Halsbury's Laws of England, Tort (Vol 97 (2015)), The General Law of Torts, Joint and Several Tortfeasors, para 450.

<sup>12</sup> See Halsbury's Laws of England, Damages (Vol 29 (2014)), Contribution between Wrongdoers, para 622 and see Contribution Act ss 1(3),(5),(6), 2(3) and s 7(3) (b) and discussion below.

<sup>13</sup> Contribution Act s 1(5).

<sup>14</sup> Contribution Act s 1(6) and also see *Iveco SpA v Magna Electronics Srl (formerly Italamec Srl)* [2015] EWHC 2887 (TCC) and *XL Insurance Co SE (formerly XL Insurance Co Ltd) v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm).

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case law under the former 1935 Act.<sup>15</sup> However where time limitation has the effect of extinguishing the right altogether, a right to contribution is no longer available either. And a claim in contribution under the 1978 Act itself is barred 2 years after it accrued.<sup>16</sup>

Where the issue of liability of the person claiming the contribution has been decided by a judgment, he can show that he was held responsible in law and liable to the adjudged amount, although the contribution defendant seems not to be estopped from reopening these issues.<sup>17</sup> Where the contribution claimant made payment based on a bona fide settlement alone, he must show that he would have been liable assuming that the factual basis of the claim against him could be established.<sup>18</sup>

In principle, the amount of the contribution recoverable by any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question. The courts have power in any such proceedings to exempt any person from liability to make a contribution; or to direct that the contribution to be recovered from any person amounts to a complete indemnity. However, where the defendant's liability to the person who has suffered the damage is limited, this will also provide a ceiling for recovery by the contribution claimant.<sup>19</sup>

The right to recover contribution under the Act supersedes any right, other than an express contractual right, to recover contribution otherwise than under the 1978 Act in corresponding circumstances, but the Act was not intended to interfere with existing rights to indemnity, whether contractual or quasi-contractual<sup>20</sup> or with contractual arrangements for contribution.<sup>21</sup>

However, where a contractual term provided only for an indemnity in carefully specified circumstances, but there was no express contractual provision for contribution, the contract would not be taken to exclude the statutory right to contribution.<sup>22</sup> In section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, the equivalent Scottish provision to the saving rule of section 7(3)(b) of the English Contribution Act was subject to a decision of the Supreme Court.<sup>23</sup> The question was in particular whether a contractual provision excluding liability, contribution or indemnity between the person suffering damage and its contracting party could be enforced against a third party, who was jointly liable for the damage, with the effect of excluding the third party's contribution claim against the contracting party. It was held that contribution can only be claimed from a party that would be liable to the person who suffered the damage<sup>24</sup> in its own right. Where a contract between the person who suffered damage and the party asked to contribute excluded such liability or contained an indemnity clause protecting against the effects of such liability, the party

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<sup>15</sup> See *George Wimpey & Co Ltd v British Overseas Airways Corp (BOAC)* [1955] A.C. 169; [1954] 3 W.L.R. 932; HL and the discussion below at 4.4 c).

<sup>16</sup> See Limitation Act 1980 s 10 and see Halsbury's Laws of England, Limitation Periods (Vol 68 (2008)), Particular Causes of Action; Contract, Tort And Other Claims, Contribution para. 1006.

<sup>17</sup> See Mitchell paras 11.11 ff. on court orders in favour of the contribution claimant; a provision such as s 1(5) in favour of the contribution defendant is missing in relation to a judgment against the contribution claimant. Contrast the solution in CMR art 39 which binds the contribution defendant to the judgment against the carrier claiming contribution, if the contribution defendant was given notice of the proceedings and afforded an opportunity of entering and appearance.

<sup>18</sup> Contribution Act s 1(4) and see Mitchell paras 11.16 ff. on settlements and 11.11 ff. on court orders.

<sup>19</sup> Contribution Act s.2.

<sup>20</sup> Mitchell, para 4.37. As per Law Com No 76, 1977 (Report on Contribution) para 26, the Law Commission had defined a 'right of indemnity' in their Report to include rights 'founded in quasi-contract' as well as rights 'created by contract' (as quoted in Mitchell, para 4.37).

<sup>21</sup> See Contribution Act s 7(3). In its second part it reads: "...but nothing in this Act shall affect - (a) any express or implied contractual or other right to indemnity; or (b) any express contractual provision regulating or excluding contribution; which would be enforceable apart from this Act ...".

<sup>22</sup> *Jameson v CEBG* [1998] Q.B. 323 CA, reversed on other issues at [2000] 1 A.C. 455 HL.

<sup>23</sup> *Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18, 2010 S.C. (U.K.S.C.) 87.

<sup>24</sup> Who had incurred the loss which is the basis of the contribution claim.

required to contribute would in effect not have been liable in respect of the loss or damage on which the contribution action was founded and consequently owed no contribution.

As will be seen below, there can be difficulties in delineation between the 1978 Act and international carriage conventions. In the carriage context only very few implementing instruments specifically tackle the issue and exclude the application of the 1978 Act. These are the Carriage of Goods by Road Act 1965 in relation to actions between successive carriers<sup>25</sup> and the Rail Passengers' Rights and Obligations Regulations 2010 in relation to parties responsible for the same damage.<sup>26</sup>

A recent case decided by the Court of Appeal illustrates some of the problems raised by the Act's interaction with carriage conventions.

### 3. *South West SHA v Bay Island Voyages*

In *South West SHA v Bay Island Voyages*<sup>27</sup> two main issues had to be decided: firstly, whether a contribution claim was regulated by the Athens Convention<sup>28</sup> and, secondly, whether the time limit provided in the Athens convention was only a time bar or had the effect for extinguishing the right of action altogether.

The case concerned the contribution claim pursuant to section 1 of the Civil Liability (Contribution) Act 1978<sup>29</sup> of a health authority against a sea carrier. The employee of the health authority had taken part in a corporate team building exercise and had been passenger on board the carrier's RIB (Rigid Inflatable Boat) on the Bristol Channel when incurring a spinal injury. At the time of bringing the contribution claim an action for damages against the carrier for personal injury of the passenger would have been time barred under the Athens Convention<sup>30</sup> and the relevant domestic law incorporating the Convention for such domestic carriage.<sup>31</sup>

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<sup>25</sup> See CoGRA 1965 s.5 Contribution between Carriers.

<sup>26</sup> SI 2010/1504; see s 5 Contribution between parties responsible for damage.

<sup>27</sup> 14 July 2015, [2015] EWCA Civ 708.

<sup>28</sup> In this case, the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974 in its statutory application to domestic carriage by the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670).

<sup>29</sup> Hereafter Contribution Act.

<sup>30</sup> Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974, and now also in its version as amended by its Protocol of 2002:

The Athens Convention 1974 (with its 1976 Protocol on Special Drawing Rights) applied in UK law by virtue of the Merchant Shipping Act 1995 ss.183–184 and Sch.6 for convention carriage (that is, international carriage) and for domestic carriage originally by the Carriage of Passengers and their Luggage (Interim Provisions) Order 1980 (SI 1980/1092) and now by Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) r.3. By virtue of EC Regulation on sea passengers (the Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ L131, 28.05.2009, p.25) the Athens Convention in its version of the 2002 Protocol (also referred to as Athens Convention 2002) applied since 31<sup>st</sup> December 2012 as a matter of EU law (see also Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152) and s.183(2A) of the Merchant Shipping Act 1995 providing a UK framework for the application of the EC Regulation). Since 28<sup>th</sup> May 2014, Sched 6 of the Merchant Shipping Act 1995 has been amended to give effect to the Athens Convention in its version of the 2002 Protocol (also referred to as Athens Convention 2002), but the previous version of the Athens Convention remains in force for domestic carriage (see r.3 of the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014) falling outside the application of the EC Regulation on sea passengers (see r. 4 of the Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152)); but see the raised limits for UK carriers by the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 1998/2917).

<sup>31</sup> See Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) r.3, as preserved by r.3 of The Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 after the coming into force of the 2002 Protocol and its implementation into UK law by the 2014 Order.



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It was argued on behalf of the carrier that the Convention's stipulation<sup>32</sup> that "no action for damages for death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention" meant that no contribution action could be taken outside the Convention's rules. Under the convention however the action was time barred, since article 16 provided that "an action for damages arising out of the death of or personal injury to a passenger or for the loss of or damages to luggage shall be time-barred after a period of two years".<sup>33</sup>

The Court of Appeal<sup>34</sup> disagreed on both accounts. The Convention<sup>35</sup> provided exclusive rules on liability of an actual or performing carrier to a passenger for damages,<sup>36</sup> but explicitly without prejudice to rights of recourse between a carrier and performing carrier.<sup>37</sup> The carriers' interaction inter se was covered no further by the Convention, nor were recourse rights between carriers and other parties dealt with by the Convention.<sup>38</sup> There was therefore a gap which could be filled by other legal or contractual provisions.

Indeed, it was clarified by Lord Hope of Craighead in *Sidhu v British Airways Plc*<sup>39</sup> for air carriage that while the Warsaw Convention aimed at holistic harmonisation of those issues that were covered, in that the remedies available to passengers could only be those of the Convention and no others, the convention only provided partial harmonisation insofar as it covered the issues. While there had been controversy whether the Warsaw Convention<sup>40</sup> and in particular their limitation provisions applied to contribution claims, that it did not was clarified further by the Montreal Convention.<sup>41</sup> A similar approach was to be taken with the Athens Convention which covered claims by passengers, but not claims for contribution between carriers.<sup>42</sup>

Instead, contribution was covered by English domestic law under the Civil Liability (Contribution) Act 1978. However, the convention's regime and the inherent question of the carrier's liability to the passenger under the convention was nevertheless a critical element for the contribution claim,<sup>43</sup> as a carrier was only liable for contribution if he would have been liable to the passenger.

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<sup>32</sup> Art 14 of the Athens Convention 1974.

<sup>33</sup> Art 16.1 of the Athens Convention 1974.

<sup>34</sup> The leading judgment was given by Tomlinson LJ; Kitchen LJ and Laws LJ agreed.

<sup>35</sup> See Athens Convention 1974 art 4. Other Conventions also provide similarly: see Guadalajara Convention, esp. art X; MC arts 39 ff. and esp. art 48; HambR art 10, esp. 10.6.

<sup>36</sup> See Athens Convention 1974 art 14.

<sup>37</sup> Athens Convention 1974 art 4.5.

<sup>38</sup> See *South West SHA v Bay Island Voyages* [15-21].

<sup>39</sup> [1997] AC 430 at 444 and 447.

<sup>40</sup> *South West SHA v Bay Island Voyages* [18]: "In a line of cases the District Court and in one case a State Appellate Court in the United States held that Article 29 of the Warsaw Convention applied to recourse actions against carriers – see *Magnus Electronics Inc v Royal Bank of Canada* 611 F Supp 436 (ND Ill, 1985), 19 Avi 17,944; *Oriental Fire and General Insurance Co Ltd v Citizens National Bank of Decatur* 581 NE 2d 49 (Ill App, 1991); *Royal Insurance Co v Emery Freight Corp* 834 F Supp 633 (SD NY, 1993). However in *Connaught Laboratories Ltd v Air Canada* (1978) 23 OR (2d) 176 (Ont HC) the Ontario High Court concluded that Article 29 had no effect on the claims of carriers between themselves."

<sup>41</sup> *South West SHA v Bay Island Voyages* [20] referring to MC art 37, *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008) and *Shawcross and Beaumont*, Air Law, Issue 142, September 2014, at paragraph 446.1. In particular: "In *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008), followed in *Allianz Global Corporate & Speciality v EMO Trans California Inc* 34 Avi 15,274 (ND Cal, 2010) the US Court of Appeals for the Ninth Circuit held that the reference in Article 37 to the existence of a right of recourse excluded the applicability of the limitation provisions of Article 35."

<sup>42</sup> *South West SHA v Bay Island Voyages* [17]. See also *Cairns v Northern Lighthouses Board* [2013] CSOH 22; [2013] SLT 645 at [53] for acceptance of a recourse claim against a recourse defendant who could invoke the provisions of the Athens Convention against the injured passenger but not against the recourse claimant, the employer of the injured passenger.

<sup>43</sup> *South West SHA v Bay Island Voyages* [21].

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However, since there would be no claim for contribution against a contribution debtor if the underlying claim against him was no longer in existence,<sup>44</sup> the next question for the court was the nature of the time bar in article 16 of the Athens Convention. Only if the original claim had been extinguished, in contrast to simply having been barred by lapse of time, would this be a valid defence against the contribution claim. Tomlinson LJ compared different conventions and their wording and the effect that had been connected to them as well as looking at their interpretation in cases that had been decided so far.

He contrasted two core themes: on the one hand, was that enshrined in the Warsaw Convention “the rights... shall be extinguished”<sup>45</sup>, in the Limitation Act 1980 in its special provisions dealing with conversion<sup>46</sup> and with claims to recover land<sup>47</sup> and defective products<sup>48</sup> stipulating the right of action to be extinguished, and in the formulation of the Hague Visby Rules “in any event the carrier and the ship shall be discharged”.<sup>49</sup> On the other hand, was the approach expressed in the language of the Maritime Conventions Act 1911 “no action shall be maintainable to enforce a claim”<sup>50</sup>, of The Brussels Convention on Collisions 1910 “actions for recovery of damage are barred after an interval of two years”<sup>51</sup> and of the Limitation Act 1980 for time limits for actions for tort or simple contract “an action founded on tort/simple contract shall not be brought after the expiration of six years”<sup>52</sup> and in section 14B “(1) An action for damages... shall not be brought after the expiration... (2) This section bars the right of action...”<sup>53</sup>.

In so doing, he elaborated on the cases of *Aries Tanker Corporation v Total Transport Limited*<sup>54</sup> on the Hague Visby Rules and maritime conventions and *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation)*<sup>55</sup> on the effect of section 14B of the Limitation Act 1980 in contrast to other provisions of the same Act. He concluded that there was a clear distinction between time limits barring the rights of action or extinguishing them and these distinctions had to be observed and their effect noted. This was also the case when interpreting international conventions. While their wording was not as decisive as in English statutes, indeed their interpretation unconstrained by technical rules of English law or English legal precedent, they were construed on broad principles of general acceptance, allowing for other language versions to be taken into account.<sup>56</sup>

On interpretation, the focus was on giving effect to the uniform character of the convention and that was to be exclusive of any resort to domestic law, whether one’s own or that of other Convention states. While it was important to have regard to any international consensus upon the

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<sup>44</sup> Civil Liability (Contribution) Act 1978 s 1(3).

<sup>45</sup> WC art 29.1.

<sup>46</sup> Limitation Act 1980 s 3(2).

<sup>47</sup> Limitation Act 1980 s 17 and s 18(2) and (3).

<sup>48</sup> Limitation Act 1980 s 11A(3).

<sup>49</sup> HVR art III r.6 and see *Aries Tanker Corporation v Total Transport Limited* [1977] 1 WLR 185 at 188 Lord Wilberforce.

<sup>50</sup> Maritime Conventions Act s 8, repealed, and see now s 190 of the Merchant Shipping Act 1995: “no proceedings to which this section applies shall be brought after the period of two years”.

<sup>51</sup> Brussels Convention on Collisions 1910 art 7.

<sup>52</sup> Limitation Act 1980 ss 2 and 5.

<sup>53</sup> *South West SHA v Bay Island Voyages* [26] referring on the interpretation of s 14B to *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation)* [2005] EWCA Civ 1408, [2006] QB 808.

<sup>54</sup> [1977] 1 WLR 185.

<sup>55</sup> [2005] EWCA Civ 1408, [2006] QB 808.

<sup>56</sup> See *South West SHA v Bay Island Voyages* [29 -30] referring to *Stag Line Ltd v Foscolo, Mango and Co. Ltd* [1932] AC 328 at 350 Lord Macmillan and *James Buchanan & Co Ltd v Babco Forwarding & Shipping (U.K) Ltd*, [1978] AC 141 at 152 E Lord Wilberforce.



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understanding of the provisions of international conventions and thus to what courts in other jurisdictions suggested, regard had to be given to the actual words used and their meaning.<sup>57</sup>

While there might not be international consensus on the understanding of the relevant provision there seemed to be broad consensus as to a distinction between time limits extinguishing the substantive right and those of merely barring the action and there was a related distinguishing terminology used by each system of law. The wording of the limitation provisions in the Warsaw and Montreal Conventions, according to a general, albeit not uncontested understanding, were interpreted as right extinguishing. In contrast, the wording used in the Athens Convention pointed to a mere time bar; this was the appropriate effect and in keeping with the plain natural content of the words used. A different effect could only be obtained by demonstrating a different autonomous and internationally understood meaning, which, however, did not exist in this case.<sup>58</sup>

Appeal was therefore allowed against the decisions of the lower courts which had dismissed the contribution action as extinguished by lapse of time.

The case highlights a number of interesting questions on the application or exclusivity of convention systems to recourse or contribution claims and the effect of convention time bars. So, what are the convention provisions in this context?

### 4. Cargo transport convention systems on multiple carrier rules and rights of recourse

#### 4.1 Overview

To examine whether a convention provides rules on recourse or contribution between carriers the conventions' rules on multiple carriers are now compiled and contrasted.

| Convention system  | or | Successive carrier rules   | Contractual and actual carrier rules                                  |
|--|----|--|---|
| CMR <sup>59</sup><br>arts 34 - 40                        |    | Strict successive carrier (SC) rules— all carriers carrying under same contract and by taking over the consignment note liable for complete transit (34) | N/A   |
| CIM <sup>60</sup><br>arts 26, 45, 50-52<br>arts 27, 45.6 |    | Strict SC rules - all carriers carrying under same contract and by taking over the consignment note liable for complete transit (26);<br>No joinder!     | Rules also for substitute carriage (joint and several liability) (27) |

<sup>57</sup> *South West SHA v Bay Island Voyages* [31] referring to *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 at 677, Lord Hobhouse: "...Whilst it is important to have regard to the international consensus upon the understanding of the provisions of international conventions and hence to what the courts in other jurisdictions have had to say about the provision in question, the relevant point for decision always remains: what do the actual words used mean? (*Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, the Hague Rules; *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, CMR, *Fothergill v Monarch Airlines Ltd* [1981] AC 251, Amended Warsaw; *Sidhu v BA, sup*, Warsaw.)".

<sup>58</sup> *South West SHA v Bay Island Voyages* [32 - 45], also referring to Berlingieri, *Time-Bared Actions*, (2<sup>nd</sup> edn, LLP, 1993).

<sup>59</sup> The United Nations Convention on International Carriage of Goods by Road 1956.

<sup>60</sup> CIM 1999; CIM standing for Uniform Rules Concerning the Contract of International Carriage of Goods by Rail. It is the Appendix B to the Convention concerning International Carriage by Rail 1999 (COTIF). To show CIM's basis in the COTIF Convention, reference is therefore made at times as COTIF-CIM.

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|  |   |  |
|--|---|--|
| <b>WS 1929</b> <sup>61</sup><br>art 30 (&<br><i>Guadalajara</i><br><i>Conv. 1961</i> ) <sup>62</sup> | SC rules – art 30 - all carriers part of contract to extent of their part of carriage; liable generally only for own part of carriage | <i>Actual carrier rules via Guadalajara Convention</i>                             |
| <b>MC</b> <sup>63</sup><br>arts 36, 48<br><i>arts 39 - 48</i>  | SC rules – art 36 – all carriers part of contract to extent of their part of carriage; liable generally only for own part of carriage | <i>Actual carrier rules (arts 39 – 48)</i>   |
| <b>HVR</b> <sup>64</sup><br>art.III r.6 bis  | N/A   | N/A  |
| <b>Hamburg Rules</b> <sup>65</sup><br>arts 10, 20.4  | N/A   | <i>Joint and several liability of contr. and actual carrier (10.4)</i>             |
| <b>RR</b> <sup>66</sup><br>arts 20, 64   | N/A   | <i>Joint and several liability of contr. carrier and maritime perf. party (20)</i> |
| <b>CMNI</b> <sup>67</sup><br>arts 4, 24.4  | N/A   | <i>Joint and several liability of contr. and actual carrier (4.5)</i>              |

Table1: Overview over convention coverage of regimes on multiple carriers.

As can be seen in Table 1, many of the transport conventions give some guidance on recourse actions or contain rules on successive carriers and the apportionment/division of liability amongst them, often also including rules on which carrier can be sued by cargo.<sup>68</sup> If applicable, these international rules ought to take priority over any other domestic provisions.<sup>69</sup>

While many of the conventions give a right of action to the cargo claimant against the actual carrier alongside the contractual carrier,<sup>70</sup> often explicitly stipulating their joint and several liability,<sup>71</sup> they mostly leave rights of recourse between the carriers unregulated.<sup>72</sup> Some conventions are limited to highlighting that recourse actions are not affected by the convention,<sup>73</sup> whereas others give a minimum timeframe for limitation of recourse actions.<sup>74</sup>

<sup>61</sup> The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw) 1929.

<sup>62</sup> The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara) 1961.

<sup>63</sup> The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal) 1999.

<sup>64</sup> The International Convention for the Unification of certain Rules relating to Bills of Lading of 1924 (Hague Rules) as amended by the 1968 Brussels Protocol (Visby Protocol) (Hague-Visby Rules).

<sup>65</sup> The United Nations Convention on the Carriage of Goods by Sea (Hamburg) 1978 (Hamburg Rules).

<sup>66</sup> The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam) 2008 (Rotterdam Rules).

<sup>67</sup> The Convention on the Contract for the Carriage of Goods by Inland Waterway (Budapest) 2001 (CMNI).

<sup>68</sup> See the land and air conventions, CMR arts 34 – 40, CIM arts 26, 45, 50-52, WS art 30, and MC art 36-37.

<sup>69</sup> See e.g. CoGSA 1965 s 5(1), Rail Passengers' Rights and Obligations Regulations 2010/1504, Pt 2(2) reg. 5(1) and see Civil Liability (Contribution) Act 1978 (hereafter Contribution Act) s 7(3)(a). See also the Vienna Convention on the Law of Treaties (1969), arts 26 – 29; Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> edn, CUP 2013), p.172 and the discussion below at 4.3 d) on recourse time bars under CIM.

<sup>70</sup> See the air conventions the Warsaw regime via the Guadalajara Convention, MC arts 39 – 45, the sea and inland waterway conventions, HambR art 10, RR arts 19 and 20, CMNI art 4 and the rail convention in its provision for a substitute carrier, CIM art 27.

<sup>71</sup> See the sea and inland waterway conventions, HambR art 10.4, RR art 20, CMNI art 4 and the rail convention in its provision for a substitute carrier, CIM art 27.

<sup>72</sup> See as an exemption from this rules the CMNI with its article 4.1, providing that the convention liability rules also apply between contracting and actual carrier.

<sup>73</sup> See Guadalajara Convention art X, MC arts 37 and 48,

<sup>74</sup> See the sea and inland waterway conventions, HVR art III r6 bis, HambR art 20.4, RR art 64, CMNI art 24.4

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Since the conventions are mandatory to differing degree, awareness of the extent of the conventions' provisions on recourse claims and possible gaps that could be filled contractually is essential. Some of the conventions only prohibit that the carrier reduces his liability,<sup>75</sup> but others require that all their rules are adhered to.<sup>76</sup>

Indeed the most extensive coverage of carriers inter se, where they are falling within the framework of successive carriers is provided by the CMR<sup>77</sup> and to a lesser degree by CIM with some much more limited provisions in the air conventions.

### 4.2 CMR:

#### a) *Successive carrier provisions*

The CMR regulates successive carriers in Arts 34 – 40. If the carriers are carrying as true successive carriers, that is, under one contract as enshrined in the consignment note and by taking over the goods and the consignment note, they all become liable for the performance of the contract as a whole.<sup>78</sup> However as a counterpart to this wide-ranging liability suit against them is limited. The cargo claimant only has the right to sue the first carrier, the last carrier or the carrier responsible for the goods at the time the event resulting in the liability occurred, although he can sue more than one of these carriers at any one time.<sup>79</sup>

#### b) *The system of recourse*

The liability between successive carriers is ultimately determined according to causality: the carrier or carriers who have caused the loss or damage are to be solely liable. A carrier who has paid compensation can recover the compensation paid according to these principles from the carriers responsible. If the cause of the loss cannot be determined, all carriers share in the compensation in proportion to the share of payment of the carriage charges due to them. Where a carrier is insolvent his share will be absorbed by the others in the same way, in proportion to the share of carriage charges due to them.<sup>80</sup> Recourse claims are possible in one and the same forum against all carriers in the court of the country whereof one of the successive carriers involved in the carriage has his place of business,<sup>81</sup> yet the place of business of the carrier suing for recourse cannot provide the connecting factor to allow suit in his home country.<sup>82</sup> However, the successive carrier whose place of

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<sup>75</sup> See CIM art 5 which outs the decreasing of the carriers liability but allows for agreement of greater and more burdensome obligations of the carrier than provided in the Rules; under the HR and HVR – art III r.8 a carrier cannot be relieved from liability and similar as per RR art 79 and HambR art 23.1 & 23.2 provisions to the extent that they limit or decrease obligations and liability of carrier are void.

<sup>76</sup> See e.g. CMR art 41 which is strict and does not allow change whether increasing or decreasing a carrier's liability other than amendments to the liability regime of successive carriers (CIM art 40); see also the CMNI art 25.1 according to which contractual stipulations that exclude, limit or increase liability of the carrier are null and void; and WC arts 23 & 32 and MC art 26 & 49 where a clause infringing the provisions of the convention is null and void, but MC allows for some freedom for the carrier to waive defences in art 27.

<sup>77</sup> On their definition, their liability outwardly and inter se, time limits and rights of suit and jurisdiction.

<sup>78</sup> CMR art 34 and see Clarke, *International Carriage of Goods by Road: CMR* (6<sup>th</sup> edn, Informa Law, 2014) (hereafter Clarke), para 50 ff.; Messent, Glass, Hill & Messent, *CMR: Contracts for the International Carriage of Goods by Road* (3<sup>rd</sup> edn, LLP, 2000) (hereafter Hill & Messent) para 11.1 ff.; and Schmidt, Herber, *Münchener Kommentar zum Handelsgesetzbuch, Band 7, §§ 407 – 619 Transportrecht* (3<sup>rd</sup> edn, Verlag C H Beck, 2014) (hereafter MüKo HGB) CMR, art 34, para 8 ff. (Jesser-Huß).

<sup>79</sup> CMR art 36.

<sup>80</sup> CMR arts 37-38.

<sup>81</sup> CMR art 39.2; and these rules are different from the forum rules in cargo claims, which are regulated in CMR art 31; and see *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2015] 3 W.L.R. 1173, in particular see [33 – 42].

<sup>82</sup> See *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 1 W.L.R. 1363; [1981] 2 Lloyd's Rep. 402 (CA), Clarke, para 53 ff., Hill & Messent para 11.119 ff. and also MüKo HGB, CMR, art 39, para.7.

business has been chosen to found jurisdiction does not have to be a defendant.<sup>83</sup> The carriers from whom contribution is claimed cannot dispute the validity of the payment made by the claiming carrier if the amount of the compensation was determined by judicial authority made after the carriers from whom contribution is sought were notified of the proceedings and afforded an opportunity to enter an appearance.<sup>84</sup> Suit must generally be brought within one year,<sup>85</sup> from judgment against the carrier or, if settled out of court, from actual payment of the claim.

### c) *Mandatory application*

The CMR provides for mandatory application of its rules and variation of its provisions is thus generally not possible.<sup>86</sup> However, CMR carriers can vary the final distribution of carrier liability amongst each other.<sup>87</sup> Yet, this freedom to contract on other terms does not extend to amending the time limits provided by the Convention,<sup>88</sup> whether amongst successive carriers or otherwise.<sup>89</sup>

### d) *Boundaries*

Where a carrier is not a successive carrier but a sub-contracted carrier, he will carry under the CMR<sup>90</sup> under his own contract, possibly made with the principal carrier as sender, and the ordinary rules of suit including the general limitation periods apply, that is, from the time of the damaging event, irrespective of any contract terms to the contrary.<sup>91</sup> It has therefore been observed that where limitation is an issue, some jurisdictions have broadened the definition of a successive carrier or applied the limitation provision between successive carriers by analogy to any carrier – sub-carrier relationship. Whether this is appropriate is open to discussion and disputed.<sup>92</sup> Discussion goes even so far as to query the appropriateness of the successive carrier system altogether.<sup>93</sup>

Indeed much case law has been provided on the successive carrier concept and it seems that English law, for now,<sup>94</sup> has found its own particular solution, allowing for the taking over of the goods and the consignment note by an agent on behalf of the principal – possibly even an undisclosed principal,<sup>95</sup> thus enabling a fictitious handing down of the goods and the consignment note for the purpose of fulfilling the requirements of article 34 of the CMR.

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<sup>83</sup> See CMR art 39.2, *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 1 W.L.R. 1363; [1981] 2 Lloyd's Rep. 402 (CA), Clarke, para 53 ff., Hill & Messent para 11.119 ff. and also MüKo HGB, CMR, art 39, para.7.

<sup>84</sup> CMR art 39.1.

<sup>85</sup> Unless there is wilful misconduct, in which case there is a three year limitation period, see art 39.4.

<sup>86</sup> Whether by standard conditions of carriage or otherwise, see CMR art 41.

<sup>87</sup> CMR art 40, allowing changes to the allocation in arts 37 and 38 only. In particular, CMR art 39 cannot be contracted out of.

<sup>88</sup> CMR art.39.4 applies the art.32 one year limitation period, yet the period only begins from the date of the last judicial decision fixing the amount of compensation payable or, in the absence of a judicial decision, the date of payment.

<sup>89</sup> See CMR art 40 and 41.

<sup>90</sup> Providing there is international transport involving a convention state as per CMR art 1.

<sup>91</sup> CMR art 41. So also the Swedish position: see H Tiberg, J Schelin *On Maritime and Transport Law* (4th edn Axel Ax:son Johnson Institute for Maritime and other Transport Law 2014) 167 with reference to Swedish Supreme Court, NJA 1996.211: the time bar of CMR art 32 is also applicable between carriers and sub-carriers.

<sup>92</sup> See Hill & Messent para 11.11 ff. and Clarke, para 44b(i) with further references to French, German and Austria decisions; in favour also Staub HGB, CMR, art 34, paras 23 ff and art 39, paras 2 and 12 (Helm) with further references and also to Austrian case-law. Cf. for the strict application of the successive carrier requirements see Tiberg & Schelin, *On Maritime and Transport Law* (4<sup>th</sup> edn, Axel Ax:son Johnson Institute for Maritime and other Transport Law, 2014) p 167 with reference to Swedish Supreme Court, NJA 1996.211; MüKo HGB, CMR, art 37, para 2 - 3 and CMR, art 39 paras 2, 9 (Jesser-Huß); Thume, art 39, para 2 (Schmid) and Koller, CMR, art 39, para 5.

<sup>93</sup> MüKo HGB, CMR, art 34 para 7 (Jesser-Huß).

<sup>94</sup> See *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2015] 3 W.L.R. 1173 at [13].

<sup>95</sup> In English law one may mostly be able to come to a contractual relationship including the primary contractual carrier as carrier under the CMR consignment note by means of implied (and possibly undisclosed) agency, so that the carrier issuing or taking over the consignment note does so also on behalf of the carriers up the chain (even if he does not disclose any agency relationship for the issue of the consignment note) – see Messent, Glass, Hill & Messent, *CMR: Contracts for the International Carriage of Goods by Road* (3<sup>rd</sup> edn, LLP, 2000) paras 11.19 f and 11.42 f; Glass and Cashmore, *Introduction to the Law of Carriage of Goods* (Sweet & Maxwell, 1989), para 7.74; Clarke para 50b(i) and *Coggins T/A PC Transport v LKW*

### e) Extended application of the successive carrier notion

However is such a broad understanding of the notion of successive carriers necessary to effect recourse between carriers or could the same result be achieved by means of the Civil Liability (Contribution) Act 1978? Indeed in discussing relevant case-law on such extension Professor Clarke remarked: "...imputed agency like this does little to recommend English law to lawyers abroad",<sup>96</sup> and while in a recent decision the parties assumed this broad successive carrier notion, Lord Mance seemed to question its unequivocal acceptance.<sup>97</sup>

Section 5 of the Carriage of Goods by Road Act 1965 only ousts the Civil Liability (Contribution) Act 1978 insofar as the matter falls within article 34 and the Chapter VI CMR rules on successive carriers.<sup>98</sup> If, however, there are no successive carriers in the sense of article 34, one may think that section 1 of the Civil Liability (Contribution) Act 1978 could take its place for contribution claims.<sup>99</sup> What therefore has the 1978 Act to offer? Contribution can be claimed under the 1978 Act by a person liable in respect of any damage to another person from any other person who is liable for the same damage,<sup>100</sup> so also by one carrier for damage caused to the same cargo carried from another carriage who is liable for the cargo damage to the cargo claimant. It does not matter whether the liability is in contract, tort or bailment.<sup>101</sup> Thus, these requirements should normally be fulfilled where several carriers are involved, whether as successive or sub-contracted carriers, in the carriage of goods and where the cargo is lost, damaged or delayed. For example, a primary contractual carrier<sup>102</sup> is liable in contract to the consignor or consignee for any loss or damage caused and the sub-contractor he used is also liable to the same consignor/consignee, either in contract under a consignment note in favour of the consignor/consignee or in tort or bailment for any loss or damage to the goods while in his care; equally for any sub-sub-contractors.

It will be remembered that under the 1978 Act the court has discretion to award any contribution that it thinks "just and equitable having regard to the extent of that person's responsibility for the damage in question"<sup>103</sup> and this allows the court to decide between a complete exemption from liability for contribution to ordering full indemnity.<sup>104</sup> Therefore, the rules of the 1978 Act allow the

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*Walter International Transportorganisation AG* [1999] Lloyd's Rep 255 (CLCC (BL) = Central London County Court (Business List)), but also see the questioning comment by Lord Mance in *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2015] 3 W.L.R. 1173 at [13]. Indeed, whether principles of English agency law should be applied to what is in effect the definition of a successive carrier under the CMR as international convention is questionable. On agency in the carriage context in general see Bugden, chs 1 and 2. In this vein, see also the recent broad interpretation of the successive carrier notion according to the decision of the Dutch Supreme Court of 11<sup>th</sup> September 2015, case no.14/03211.

<sup>96</sup> See Clarke para 50b(i) discussing *Ulster-Swift Ltd. and Another v. Taunton Meat Haulage Ltd. and Another* [1977] 1 W.L.R. 625; [1977] 1 Lloyd's Rep. 346 (CA) and *Coggins T/A PC Transport v LKW Walter International Transportorganisation AG* [1999] Lloyd's Rep 255 (CLCC (BL) = Central London County Court (Business List)).

<sup>97</sup> See *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2015] 3 W.L.R. 1173 at [13].

<sup>98</sup> Carriage of Goods by Road Act 1965, section 5 reads: "Contribution between carriers.

(1) Where a carrier under a contract to which the Convention applies is liable in respect of any loss or damage for which compensation is payable under the Convention, nothing in [section 1 of the Civil Liability (Contribution) Act 1978], or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 shall confer on him any right to recover contribution in respect of that loss or damage from any other carrier who, in accordance with article 34 in the Schedule to this Act, is a party to the contract of carriage.

(2) The preceding subsection shall be without prejudice to the operation of article 37 in the Schedule to this Act."

<sup>99</sup> See also Mitchell, para 4.54 and Hill & Messent para 11.81. For an overview on contribution under the 1978 Act see above at 2) and on contribution in the carriage context see also Hill & Messent, paras 11.71 ff (on CMR) and Bugden, paras 11-013 – 11-020 (general overview).

<sup>100</sup> Contribution Act s.1(1).

<sup>101</sup> Contribution Act s.1(1) and s.6(1). And see above at 2) and Mitchell, paras 4.35 – 4.37 on the ambit of the Act.

<sup>102</sup> Or possibly better called the principal contractor.

<sup>103</sup> Contribution Act s.2(1).

<sup>104</sup> Contribution Act s.2(2).



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court a wide discretion and while they do not exactly mirror the CMR provisions on contribution, the spirit is similar: the person responsible for the damage shall ultimately pay. The Act enforces limits imposed whether by law or by agreement between parties<sup>105</sup> and this is similar to the CMR's adherence to the liability limits and any carrier agreements allowed by article 40 as to the share of any compensation due. Since the CMR only provides for a bar of the remedy as a consequence of the expiry of the time period for suit,<sup>106</sup> there should be no issue on limitation; the 1978 Act allowing a contribution claim for an underlying time barred action being made, as long as the underlying claim is not extinguished.<sup>107</sup>

One may think that this would therefore mean that if one took a claim between carriers not to fall within the provisions of Chapter VI of the CMR, the Civil Liability (Contribution) Act 1978 would provide a basis for contribution and the claim would expire only after two years of payment of the cargo claim by, or judgment against, the carrier seeking the contribution.<sup>108</sup> One may also think that the rules of the CMR as to jurisdiction between successive carriers as defined in article 34 CMR would then equally not apply, and the Brussels I Regulation<sup>109</sup> provisions or English procedural rules on joining third parties<sup>110</sup> or otherwise would be available uncurtailed.

However the first caveat is that the Contribution Act only applies to claims against a contribution defendant who could have been sued for damages in England or Wales; leaving contribution claims against carriers against whom jurisdiction could not be founded in the English courts uncovered<sup>111</sup> and open to suit only on fulfilment of the requirements of other causes of action, such as contract, tort, bailment or restitution, between these carriers with the insofar related difficulties.<sup>112</sup>

And further, what if, the sub-contract between the primary contractor and a sub-contracting carrier called to contribute was a CMR contract? Whilst this is not the case for domestic carriage,<sup>113</sup> the CMR applies to international carriage of goods by road, as long as either the place of taking over the goods or the place designated for delivery is a place in a contracting State.<sup>114</sup> For the subcontract the primary carrier would be the sender and his sub-contractor for international carriage the CMR carrier.<sup>115</sup> In this case, would not the rules of the CMR, which are mandatory,<sup>116</sup> override the domestic provisions? It is submitted this is so. The relationship between sender and CMR carrier, irrespective of whether these parties are both carriers would have priority; whether the sender himself is liable to another person should not alter the application of the CMR provisions to a CMR contract of carriage.

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<sup>105</sup> Contribution Act s.2(3).

<sup>106</sup> CMR art 32.4, even though, once time barred it is not exercisable by way of counter-claim or set-off either. And see below at 5).

<sup>107</sup> Contribution Act s.1(3).

<sup>108</sup> Limitation Act 1980 s.10(1).

<sup>109</sup> The EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351, 20.12.2012, p1, which as of 10<sup>th</sup> January 2015 has replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L012, 16.01.2001, p1.

<sup>110</sup> Depending on the fulfilment of the requirements of Brussels I Recast, inter alia the place of domicile of the defendant.

<sup>111</sup> Contribution Act 1978 s 1(6) and also see *Iveco SpA v Magna Electronics Srl (formerly Italamec Srl)* [2015] EWHC 2887 (TCC) and *XL Insurance Co SE (formerly XL Insurance Co Ltd) v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm).

<sup>112</sup> And on the condition that jurisdiction for such causes of action can itself be founded in England; see also Takahashi pp 18 f. and 23 ff.

<sup>113</sup> Where the 1978 Act can apply freely.

<sup>114</sup> CMR, art 1.1.

<sup>115</sup> This may be repeated several times down the line, where the sub-contractor sub-sub-contracts etc.

<sup>116</sup> As per article 41.

If one nevertheless suggested application of the Contribution Act, one may argue that section 7(3)(a)<sup>117</sup> clarifies that the 1978 Act was intended to preserve the claimants' contractual and other rights to indemnity.<sup>118</sup> Where the primary carrier can claim from his sub-contractor an indemnity for his own liability to the cargo interests who had contracted with him, because the loss or damage occurred while the goods were in charge of the sub-contractor,<sup>119</sup> the contractual rights as determined by the CMR convention would apply. And they would apply, it is submitted, with all the accompanying rules as to enforcement, such as jurisdiction, time bar, etc. The jurisdictional rules applicable would be those of article 31.1 CMR, offering several fora, without allowing exclusivity to be given to jurisdiction agreements, rather than the ones between successive carriers of article 39.2 which would allow to sue all successive carriers at the place of domicile of one of them; equally the time bar to be applied would be that of article 32.1 CMR rather than the extended timeframe of 39.4 between successive carriers.

As per article 41 CMR the provisions of the CMR cannot be derogated from, and, even between carriers, time bar provisions are not negotiable.<sup>120</sup> This suggests therefore that even where the CMR applied between carriers *inter se* the provisions of article 32 on the one year time bar would have to be applied and the English Contribution Act with a 2 year time bar could not change this. This is in contrast, for example, to the solution found in the Montreal Convention, which leaves the relationship of contracting and actual carriers between themselves, including rights of recourse and indemnification, to party agreement and domestic law,<sup>121</sup> but note the stipulation in the CMNI for inland waterways, that the convention applies also between the contractual and actual carrier.<sup>122</sup>

Thus, the use of the Civil Liability (Contribution) Act 1978 does not remedy the dilemma created by a narrow interpretation of the successive carrier concept, with the resulting jurisdictional rules and short limitation period. The longer period of limitation would then only be available by analogy between carriers as used in some jurisdictions.<sup>123</sup> The concept as widened by the agency approach of the English courts, yet still requiring carriage under the same international contract seems to plough a middle ground; at least in general, despite some excesses such as *Harrison & Sons Ltd v RT Stewart Transport Ltd*,<sup>124</sup> where the concept had been, it is suggested erroneously, applied without meeting all of the requirements. However, this approach seems to be a unique one only available due to the particular concepts of English agency law,<sup>125</sup> which is not particularly conducive to a harmonised interpretation of the CMR as international convention.<sup>126</sup>

### 4.3 COTIF-CIM

#### a) General

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<sup>117</sup> Civil Liability (Contribution) Act 1978, s 7(3) reads: "The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect—

(a) any express or implied contractual or other right to indemnity; or

(b) any express contractual provision regulating or excluding contribution; which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act)."

<sup>118</sup> Mitchell, para 4.37. And see discussion below at 4.3.d) on the effect of s.7(3).

<sup>119</sup> Without the latter being relieved from liability by article 17 CMR.

<sup>120</sup> CMR, art 40.

<sup>121</sup> Montreal Convention, art 48. And see Carriage by Air Act 1961 s.5 and above at 4.4 a).

<sup>122</sup> CMNI art 4.1.

<sup>123</sup> See above [note 90](#).

<sup>124</sup> [1993] 28 E.T.L. 747 (QB).

<sup>125</sup> Insofar also *Western Digital Corp v British Airways Plc* [2001] QB 733 (CA), [43].

<sup>126</sup> See Clarke para 50b(i). However see also the broad interpretation of the successive carrier notion according to the decision of the Dutch Supreme Court of 11<sup>th</sup> September 2015.

COTIF-CIM was the original source for the successive carrier concept, as at the time of state railways, through transport by one single provider was impossible and the service had to be performed by different carriers carrying the goods in succession to their final destination. While the CIM successive carrier concept is similar to that now enshrined in the CMR, CIM's provisions contain some differing approaches.

### *b) Successive Carrier requirements and similarities with CMR*

The similarities encompass a requirement to be a successive carrier in order to be liable for the whole journey.<sup>127</sup> Equally, a successive carrier is one who carries the goods together with other carriers under a single contract by taking over the goods and the consignment note. CIM also contains similar provisions as to the division of final liability amongst the carriers based on causality, failing this based on the division of shares in the freight due, which can be varied by agreement.<sup>128</sup>

While all carriers are liable under the CIM contract, only the first, the last, or the carrier in whose care the goods were lost or damaged can be sued by the cargo claimant,<sup>129</sup> or the carrier who was entered with his consent as the carrier to deliver the goods at destination.<sup>130</sup> The last carrier in art 45.1 is therefore interpreted, not as the carrier entered to deliver the goods if he in fact never received them, but the carrier who had been the last to take part in the actual contract by taking over the goods and the consignment note.<sup>131</sup> Indeed the carrier who gave consent to be entered into the consignment note as last carrier due to deliver the goods could already be sued in his own right according to article 45.2. This interpretation of the last carrier also goes in line with the interpretation of the equivalent provision in the CMR, the wording of which was adopted in the revision of article 45.1 of CIM. However the interpretation of the last carrier notion under the CMR is not entirely undisputed either.<sup>132</sup>

### *c) Recourse procedure:*

Thereafter, however we find subtle but important differences and CIM, for example, is rather strict in protecting the carriers from suit and the costs related to it. Whether for actions of the cargo claimant or the carrier seeking recourse a choice of defendant must be made and is final on bringing action.<sup>133</sup> CIM has not adopted the solution of article 36 *in fine* of the CMR, which allows the cargo claimant to sue several carriers at once; instead it gives the option to sue only one of the carriers; which carrier is at the choice of the claimant. Once an action is brought against one carrier the right to choose is extinguished.<sup>134</sup> The reason given was that carriers by rail did not have the same problems of solvency as road carriers had, so that plurality of suit was not necessary.<sup>135</sup> This protection of rail carriers from exposure to law suits on compensation is further backed up by a prohibition of joining recourse actions with proceedings for compensation.<sup>136</sup>

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<sup>127</sup> See CIM arts 49 ff and 3(a) for the definition of "carrier", as opposed to „substitute carrier“, and MüKo HGB, CIM, Vor art 49, para. 1.

<sup>128</sup> See CIM arts 49-50 with 52.

<sup>129</sup> CIM art 45.1.

<sup>130</sup> CIM art 45.2 - this part provision is different to the CMR, where this is not included.

<sup>131</sup> This is explained as a result of redrafting the provision for CIM 1999. See the previous version of the article, CIM 1980 art 55.3: "Other actions arising from the contract of carriage may be brought against the forwarding railway, the railway of destination or the railway on which the event giving rise to the proceedings occurred. Such actions may be brought against the railway of destination even if it has received neither the goods nor the consignment note." and the Explanatory Report to CIM 1999 art 26 para 3, art 45 para 2. Cf. MüKo HGB, CIM, art 45, para 10 (Freise) and Koller, CIM, art 45, para 2, fn 6 who also require this last carrier to deliver the goods.

<sup>132</sup> See e.g. Hill & Messent, para 11.63 ff., MüKo HGB, CMR, Art 36 para 5 (Jesser-Huß), MüKo HGB, CIM, art 45 para 10 (Freise) and Koller, CIM, art 45, para 2, fn 6 and Explanatory Report to CIM 1999 art 45 para 2.

<sup>133</sup> CIM arts 45.7 and 51.2.

<sup>134</sup> See CIM art 45.7 and Explanatory Report to CIM 1999, art 45, para 1 and MüKo HGB, CIM, art. 45, para.2.

<sup>135</sup> Explanatory Report to CIM 1999, art 45, para 1.

<sup>136</sup> CIM art 51.6.

Limiting the rail carrier's exposure to suit as well as minimising the costs and expenses incurred in litigation as a theme can be further observed in the procedure for recourse actions. Similar to the CMR, proceedings may be brought against all successive carriers in the court where one of the defendant carriers has his principal place of business, at the choice of the claimant carrier.<sup>137</sup> However, under CIM, recourse actions between successive carriers must be made against all carriers in the same court and proceedings, otherwise the right of recourse against any carriers not so sued is lost.<sup>138</sup> In the same vein, the court must decide over all of the carriers in one and the same judgment.<sup>139</sup>

*d) Time bar for recourse actions:*

A further difference is the provision, or lack thereof, on a time bar for recourse actions. In contrast to the CMR, CIM does not provide for such a time limit which appears to have been left to domestic law. For COTIF implementations<sup>140</sup> and the embedding of the EU Rail Passenger Rights Regulation,<sup>141</sup> in neither, the Railways (Convention on International Carriage by Rail) Regulations 2005 nor the Rail Passengers' Rights and Obligations Regulations 2010,<sup>142</sup> has any provision been made regarding limitation of recourse claims between carriers based on carriage within the Regulations and thus COTIF-CIM, COTIF-CIV<sup>143</sup> or the EU Rail Passenger Rights Regulation.

In England and Wales, if taken as a contract, quasi-contract or tort claim or a claim for sums recoverable by statute (which had been taken to encompass contribution-type claims), limitation would be 6 years,<sup>144</sup> yet as, and only as, a statutory contribution claim under the Civil Liability (Contribution) Act 1978 the special limit would be 2 years from the date of judgment or award or, if no judgment was rendered, from the date of payment.<sup>145</sup> How would the recourse claim thus be classified - which of the above would it be? Would it be the 6-year limit or would a recourse claim under CIM be classified as a claim falling within the Contribution Act resulting in a 2-year time bar?

Unlike the Carriage of Goods by Road Act 1965, implementing the CMR, which gives explicit priority to the provisions of successive carriage under the CMR<sup>146</sup> and insofar also disapplies the Civil Liability (Contribution) Act 1978,<sup>147</sup> the Railways (Convention on International Carriage by Rail) Regulations

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<sup>137</sup> CIM art 51.3 and 51.4.

<sup>138</sup> CIM art 51.2.

<sup>139</sup> CIM art 51.3.

<sup>140</sup> Apart from CIM, in Annexe B, COTIF contains several other Annexes, including rules on passenger transportation in the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by (CIV). Since the focus of the article is on freight forwarding and carriage of goods, reference is only made to CIV where necessary and relevant for a comparison.

<sup>141</sup> The Regulation (EU) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passenger's rights and obligations, implementing with some slight changes the provisions of COTIF-CIV for rail passengers (hereafter EU Rail Passenger Rights Regulation).

<sup>142</sup> SI 2010/1504, giving effect to the EU Rail Passenger Rights Regulation.

<sup>143</sup> Whether direct or via the EU Rail Passenger Rights Regulation incorporating the successive carrier rules of CIV (see EU Rail Passenger Rights Regulation art 11, incorporating inter alia Title VII of COTIF-CIV).

<sup>144</sup> Limitation Act 1980, ss 2, 5 and 9. See also Law Commission Report on Limitation of Actions of 2001 (LAW COM No. 270) paras 2.71 ff., inter alia referring to *Re Farmizer (Products) Ltd* [1997] 1 BCLC 589 144, applying s 9(1) of the 1980 Act to a claim under s 214 of the Insolvency Act 1986 against a director for a contribution towards a company's assets and *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants VOF (No 2)* [1999] 2 Lloyd's Rep 443, David Steel J followed *Re Farmizer* holding that the application of s 9(1) of the 1980 Act was not restricted to liquidated sums, but that it applied to any monetary relief whether in the form of a debt, damages, compensation or otherwise.

<sup>145</sup> According to the Limitation Act 1980, s 10.

<sup>146</sup> While the CMR also includes time bar provisions for successive carrier recourse actions.

<sup>147</sup> Section 5 of the CoGRA 1965 on Contribution between carriers states: "(1) Where a carrier under a contract to which the Convention applies is liable in respect of any loss or damage for which compensation is payable under the Convention, nothing in section 1 of the Civil Liability (Contribution) Act 1978, or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 shall confer on him any right to recover contribution in respect of that loss or damage from

2005<sup>148</sup> implementing the COTIF Convention, omit any such provision. Could this omission lead to conflict between the COTIF Convention and the English Contribution Act and thus also impact the question of classification of the recourse action? COTIF -CIM<sup>149</sup> contains stipulations on recourse actions between successive carriers<sup>150</sup> and provides for the mandatory application of its uniform rules,<sup>151</sup> while the right provided by the English Contribution Act, in principle, is to supersede any other right to contribution.<sup>152</sup>

Several solutions are possible to manage this conflict: one could either interpret the Rail Regulation to contain such priority of the convention stipulations by analogy or, at least, one could interpret the provisions of the Contribution Act sympathetic to CIM. That a disapplication provision is included in the later passed Rail Passengers' Rights and Obligations Regulations 2010,<sup>153</sup> may point to a legislative oversight in the 2005 Regulations, rather than to the alternative: an intentional change of direction so as not to give effect to the convention obligations in favour of national law.

Under section 7(3) the Civil Liability (Contribution) Act 1978 the right to recover contribution under the Act supersedes any right, other than an express contractual right, to recover contribution otherwise than under the 1978 Act in corresponding circumstances, which could be an issue with giving priority to the CIM provisions. However the section provides further that nothing in the Act shall affect an "express or implied contractual or other right to indemnity". A right to indemnity may also arise by statute.<sup>154</sup> One may wish to argue therefore that an action for recourse based on art.50 CIM is the enforcement of such an indemnity right distinct from a contribution action under the 1978 Act with the result of achieving the intended priority of CIM. This type of scenario as per CIM contribution regime, seems however not to have been considered by the Law Commission at the time of formulating the Law Reform Proposals and the words of contribution and indemnity had been carefully chosen.<sup>155</sup>

Even if one concluded that art.50 CIM confers rights to contribution rather than indemnity and thus does not fall within the exemption of the 1978 Act,<sup>156</sup> the CIM provisions should be applied. After all, courts are required to interpret ambiguities in the law in a manner that is consistent with the treaty and thus the international obligations of the United Kingdom.<sup>157</sup> Courts should therefore give priority to the convention provisions over the 1978 Act or, at the very least, give full credit to the convention's stipulations when applying their discretion in apportioning contribution under the 1978

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any other carrier who, in accordance with article 34 in the Schedule to this Act, is a party to the contract of carriage. (2) The preceding subsection shall be without prejudice to the operation of article 37 in the Schedule to this Act."

<sup>148</sup> SI 2005/2092.

<sup>149</sup> As indeed COTIF-CIV, in Chapter VII.

<sup>150</sup> See CIM arts 49- 52.

<sup>151</sup> CIM art 5.

<sup>152</sup> Contribution Act s 7(3) and set out in more detail below.

<sup>153</sup> The 2010 Rail Passenger Regulations s 5 entitled Contribution between parties responsible for damage reads: "(1) Sections 1 and 2 of the Civil Liability (Contribution) Act 1978 (entitlement to and assessment of contribution) do not apply where liability for contribution between persons liable in respect of the same damage is governed by the European Regulation. (2) In paragraph (1), 'contribution between persons liable in respect of the same damage' has the same meaning as in section 1(1) of the Civil Liability (Contribution) Act 1978 (entitlement to contribution)." Paras (3) – (4) have equivalent provisions dis-applying the operation of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

<sup>154</sup> See Halsbury's Law of England/Damages Vol 12(1) Reissue para 837 note 11.

<sup>155</sup> Law of Contract Report on Contribution (LAW COM. No.79), para 26 ff (see in particular para 27 on definition of contribution and indemnity as used in the Report). See also Working Paper No 59 "Contribution" at para 14, consistently with the Law Commission Report at para 27, only using the word indemnity where a total indemnity is referred to; it is thus unlikely that a regime similar to the CIM successive carrier contribution regime, which, depending on causality, gives contribution or full indemnity claims to successive carriers, was thought of at the time when stipulating section 7(3).

<sup>156</sup> Depending on the interpretation of the notion of indemnity used in the Act.

<sup>157</sup> See Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> edn, CUP 2013), p.172.



Act.<sup>158</sup> In analogy with the Road and Passenger Rail implementation provisions<sup>159</sup> it seems that the convention provisions would have been intended to have priority, had the issue been fully considered at the time of the devolved law making/implementation.<sup>160</sup>

Where does this therefore leave the limitation period? How the priority of the CIM provisions is achieved has impact on the limitation period as this will decide the classification of a recourse action as an action under the Contribution Act or as an action independently under CIM. It seems that the limitation period of 2 years under section 10 of the Limitation Act 1980 is not applicable if the contribution claims falls outside the Contribution Act<sup>161</sup> and that, where the contribution is provided for by statute, this falls within s 9(1)<sup>162</sup> of the 1980 Act the consequence is that a 6 year limitation applies.

*e) Type of carriers qualifying as successive carriers:*

In contrast to the CMR where only road carriers can be successive carriers, under CIM, successive carriers can not only be rail carriers, but also road or inland waterway carriers – as opposed to substitute carriers, who can only be rail carriers.<sup>163</sup>

However this may create problems of delineation with other regimes that may be applicable. CIM and thus the possible extension of the successive carrier regime to other transport modes generally only applies to supplementary transport to rail carriage if domestic.<sup>164</sup> Therefore the delineation would be between national law and CIM, yet for international on-carriage the Budapest Convention for Inland Waterways (CMNI) or the CMR could apply.<sup>165</sup> Consequently, the applicable regime and thus whether the supplementary carrier falls within the successive carriage rules of CIM will depend on whether the supplementary transport stops before crossing a border or not. Where on-carriage was international road carriage the CMR would be applicable instead, where carriage involved was at least from or to a contracting state, even if no road consignment note was issued and the carrier simply took over the rail consignment note.<sup>166</sup> The same would apply for the CMNI for international inland waterway carriage where no specific transport document is needed.<sup>167</sup>

For example, where we had an international rail transport to Maastricht under CIM followed by a short road on-transport of only a few kilometres across the border to Lanaken in Belgium, the road leg would fall outside the CIM provisions (and into those of the CMR), whereas the longer on-transport to Sittard in the Netherlands would fall into the CIM provisions and the road carrier would be part of the successive carrier regime of CIM. Thus, the same carrier could be liable under the CIM successive carrier regime if the on-transport remained in the same country and would fall outside these rules for international on-transport, presumably even where the carrier had agreed to be entered with his consent as delivering carrier into the consignment note,<sup>168</sup> as CIM would then not

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<sup>158</sup> Leading in fact to a reduction of discretion to zero.

<sup>159</sup> s.5 of the Carriage of Goods by Road Act 1965 and in s 5 of the Rail Passengers' Rights and Obligations Regulations 2010.

<sup>160</sup> See also Halsbury's Laws of England, Carriage and Carriers (Vol 7 (2015)), International Carriage by Road and Rail, International Carriage by Rail, para 750, setting out the Convention rights of recourse rules between carriers without further discussion of the Civil Liability (Contribution) Act other than pointing out its disapplication in case of carriage by EU Rail Passenger Regulation.

<sup>161</sup> See also H G Beale et al, *Chitty on Contracts* (31<sup>st</sup> edn, Sweet & Maxwell, 2012) para 28-015 note 70 and *Hampton v Minns* [2002] 1 W.L.R. 1.

<sup>162</sup> Section 9 is headed: "Time limits for actions for sums recoverable by statute".

<sup>163</sup> See CIM art 26 and 27 and CIM Explanatory Report to art 3 para 3 and MüKo HGB, CIM, art 26, para 6 and art 27 para 2 (Freise).

<sup>164</sup> See CIM art 1.3, or unless it was trans-frontier carriage on (the few) registered lines in sea or waterway transport, CIM art 1.4.

<sup>165</sup> CMR art 1.1 and CMNI art 2.1.

<sup>166</sup> See CMR art 4.

<sup>167</sup> CMNI, art 2.1.

<sup>168</sup> CIM arts 45.2 and 26 with 1.3.

apply. He would therefore for the performance of an international road carriage only be liable if his personal liability could be established, yet in case he performed only a national road leg he could be faced with potential liability for the full contractual international rail transportation.<sup>169</sup>

### *f) Substitute Carriers:*

CIM clarifies, that where the carrier is not a successive carrier, but a substitute rail carrier,<sup>170</sup> he will not be liable for the full carriage of the goods,<sup>171</sup> but only be liable under contract for the particular carriage undertaken with the difficulties of proof that the goods were indeed damaged or lost during his care. A substitute carrier is a rail carrier to whom the carrier has entrusted in whole or in part the performance of the carriage.<sup>172</sup> The CIM liability rules are applicable to him and he is directly liable to the cargo claimant, even though no direct contract was concluded between them, facilitating compensation of the cargo claimant by inter alia limiting costs and risk of insolvency of the principal carrier.<sup>173</sup>

In respect of the leg of carriage performed by him, the substitute rail carrier is liable jointly and severally with the carrier; although the latter remains liable for the whole contract in any event.<sup>174</sup> Recourse rights between the substitute carrier and the carrier are explicitly not prejudiced by the provision<sup>175</sup> and fall outside the rules of recourse between successive carriers under arts 49 ff.<sup>176</sup> They are thus left to domestic law, such as the English Contribution Act, and any contract made between the carriers, including any potential application of CIM to such contracts.<sup>177</sup> While the CMR does not have any such equivalent provision, such system is comparable to the actual and contractual carrier regimes in sea and air conventions.<sup>178</sup>

## 4.4 Air carriage conventions:

### *a) Successive Carrier Rules*

Both the Warsaw Convention system and the Montreal Convention provide for rules on successive carriage, setting out that each of the carriers who accepts passengers, luggage or goods is subjected to convention rules and is deemed to be a party to the contract, although, in contrast to the CMR and CIM, only to the extent that the contract is performed under his supervision.<sup>179</sup> Thus liability is not incurred by a successive carrier for part of the carriage unrelated to him.

Compared to the CMR and CIM, rights of suit against successive carriers, are also further restricted; in case of passenger claims to suit generally only against the carrier which performed the carriage

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<sup>169</sup> If the requirements CIM art 26 were fulfilled, although then also enabling him to possibly claim recourse according to CIM arts 50 ff.

<sup>170</sup> CIM art 27; a carrier who is not a rail carrier, but a road carrier for example is not a substitute carrier who can be sued directly, but an auxiliary according to art 40 (see Explanatory Report to CIM 1999, art 3 para 3).

<sup>171</sup> Under CIM art 49 ff.

<sup>172</sup> CIM art 27.

<sup>173</sup> See CIM arts 27.2, 27.4 and 45.6 and Explanatory Report to CIM 1999 art 45 para 4, art 27 para 1 and art 3 para 3 adopting the institution on the "actual carrier" as known in air and sea transport. The provision essentially follows that of art 10 of the Hamburg Rules, making the substitute carrier directly liable under the CIM Rules. See also MüKo HGB, CIM, art 27, paras 1 – 3 (Freise).

<sup>174</sup> CIM art 27.1 and 27.4

<sup>175</sup> CIM art 27.6.

<sup>176</sup> <sup>176</sup> See CIM arts 49 ff and 3(a) for the definition of "carrier", as opposed to „substitute carrier“, and MüKo HGB, CIM, Vor Art 49, para. 1 (Freise).

<sup>177</sup> In case the requirements were fulfilled, see CIM art 1.1 and 1.2 and requiring international carriage between CIM Member States.

<sup>178</sup> See for air carriage the Guadalajara Convention of 1962 applied under the Warsaw regime, and MC arts 39 – 48; for sea carriage the Hamburg Rules art 10 and the RR art 20 and inland waterways the CMNI art 4.

<sup>179</sup> WS art 30.1 and MC art 36.1.

during which the accident or the delay occurred.<sup>180</sup> Claims for baggage or cargo, however, can be made against the last carrier, and further, against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.<sup>181</sup>

Application of the convention systems is achieved by looking at the overall carriage; if the parties regarded the carriage as a single operation, even if the carriage is performed by several successive carriers, whether part of a single contract or a series of contracts and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.<sup>182</sup>

The Montreal Convention and, where applicable in the form of the Montreal Additional Protocol No 4, also the Warsaw Convention system<sup>183</sup> clarify explicitly that recourse claims are not covered by the convention; these are thus left to domestic law.<sup>184</sup>

### *b) Actual and contractual carriers*

Provision for actual carriers is found in the Montreal Convention and for the Warsaw Convention system is made by means of the supplementary Guadalajara Convention of 1961. Application of the conventions systems to and liability of actual carriers is clarified insofar as they perform the carriage and that of contractual carriers for the whole of the carriage.<sup>185</sup> Insofar as liability of actual and contractual carriers overlap the claimant can choose between suing the actual or contractual carrier or both, jointly or separately and carriers can make use of the rules of the *lex fori* to join the other carriers.<sup>186</sup> Recourse actions between these carriers are explicitly not prejudiced by the conventions.<sup>187</sup>

Thus whether for successive carriers, third parties or the actual contractual carrier relationship, recourse claims are outside the convention and thus governed by domestic law, including time limits for suit.<sup>188</sup> And time limitation under the air carriage conventions is a very serious matter leading to a loss of the underlying right altogether.<sup>189</sup>

### *c) Air convention time bars in context of the English Contribution Act*

Whereas the Carriage of Goods by Road Act needed not to include any time bar provision for recourse actions as this is already dealt with in the CMR Convention, a provision on extended time limitation for recourse claims under the air conventions had been made by the Carriage by Air Act 1961 in its section 5.

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<sup>180</sup> WS art 30.2 and MC art 36.2, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

<sup>181</sup> WS art 30.3 and MC art 36.3. Although contrast CIM art 45.7, where the claimant may initially have a choice between several carriers, but can only sue one of them and by making the choice loses the right of action against all others.

<sup>182</sup> WS art 31.3 and MC art 1.3.

<sup>183</sup> The Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 and further amended by the Montreal Additional Protocol No 4 of 1975, The Warsaw-Hague-MP.4 Convention (WS-H-MP4).

<sup>184</sup> See Shawcross and Beaumont, Air Law, Issue 142, September 2014, at paragraph 446.1, *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008) and *South West SHA v Bay Island Voyages* [20]. And see discussion above [n. 38-39](#).

<sup>185</sup> Guadalajara arts I - III and MC arts 39-41.

<sup>186</sup> Guadalajara art VII and MC art 45.

<sup>187</sup> Guadalajara art X and MC art 48.

<sup>188</sup> See also *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008), *United Airlines v Sercel* [2012] NSWCA 24, Shawcross and Beaumont, Air Law, Issue 142, September 2014, at paragraph 446.1 and *South West SHA v Bay Island Voyages* [17-21].

<sup>189</sup> See WS art 29 and MC art 35 and see *South West SHA v Bay Island Voyages* [41] with reference to Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 Art 35 para 28 ff.

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However section 5 had undergone several changes over time. Previously, section 5(2) had set a time bar for contribution claims to two years from the date of judgment against the carrier by air.<sup>190</sup> In *South West SHA v Bay Island Voyages* Tomlinson LJ had explained that section 5(2) of the Carriage by Air Act simply clarified that the convention's time limitation should not be read as applying to contribution claims. The initial version of this sub-section had therefore provided for the 2 year time bar from judgment out of caution, since this matter was not covered by the air conventions.<sup>191</sup> However this part was repealed by the Limitation Act 1963, most likely in the light of section 4(4) of the 1963 Limitation Act stipulating likewise<sup>192</sup> and in order to provide for time limitation for contribution in one general provision only. Yet still in the 1963 Act, section 4(4) clarified that the limitation rules for contribution rights arising from claims subject to the air convention would also be falling in the main contribution limitation rule of sub-sections (1-3), a clarification that would later fall away.<sup>193</sup>

Section 4(1) of the 1963 Limitation Act initially referred to section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 which was later replaced by section 1 of the Civil Liability (Contribution) Act 1978.<sup>194</sup> However this new section 1(3) of the 1978 Act now also included that claims for contribution could generally be enforced even if time barred, although no longer where expiry of the limitation period meant an extinction of the right instead of a mere time bar. This was an amendment of the existing law on contribution which had developed inconsistently.

Indeed, in the judgment of the House of Lords in *George Wimpey & Co Ltd v British Overseas Airways Corp (BOAC)*<sup>195</sup>, it had been held that a claimant could not recover contribution where the defendant had previously been sued by the creditor and had, by judgment been found not to be liable, even if the reason was 'merely' that the creditor's action was statute-barred. This was held to be the consequence of section 6(1)(c) of the 1935 Act allowing contribution only from a "tortfeasor who ... if sued would have been liable". Yet, in the same case Lord Reid considered obiter<sup>196</sup> that where no suit had taken place "if sued" might refer to the time at which the other tortfeasor (the contribution claimant) was sued.<sup>197</sup> This more generous view was also preferred in a Scottish case on an equivalent issue under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.<sup>198</sup> An even

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<sup>190</sup> The original version of s 5(2) read: "Article 29 in the First Schedule of this Act shall not be read as applying to any proceedings for contribution between tortfeasors, but no action shall be brought by a tortfeasor to obtain a contribution from a carrier in respect of a tort to which the said Article 29 applies after the expiration of two years from the time when judgment is obtained against the person seeking to obtain the contribution."

<sup>191</sup> *SWSHA v BIV* at [17].

<sup>192</sup> Limitation Act 1963 s.4(1) and (4) under the heading "Time-limit for claiming contribution between tortfeasors", read: "(1) Where under section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 a tortfeasor (in this section referred to as "the first tortfeasor") becomes entitled after the passing of this Act to a right to recover contribution in respect of any damage from another tortfeasor, no action to recover contribution by virtue of that right shall (subject to subsection (3) of this section) be brought after the end of the period of two years from the date on which that right accrued to the first tortfeasor."

"(4) In relation to torts falling within Article 29 in Schedule 1 to the Carriage by Air Act 1961, the preceding subsections shall have effect in substitution for the limitation imposed by subsection (2) of section 5 of that Act; and accordingly in that subsection the words from "but no action" onwards are hereby repealed:

Provided that this subsection shall not affect any action for a contribution where before the passing of this Act judgment has been obtained against the person seeking to obtain the contribution."

<sup>193</sup> See Limitation Act 1980 s 10.

<sup>194</sup> See the consequential amendment in para 6 of Schedule 1 of the Civil Liability (Contribution) Act 1978.

<sup>195</sup> [1955] A.C. 169; [1954] 3 W.L.R. 932; HL.

<sup>196</sup> [1955] A.C. 169 at p. 190.

<sup>197</sup> He also considered favourably the view that it could mean, "if sued at some time" or "if sued at the time most favourable to the plaintiff", although he did not confirm these two suggestions and left it to a later decision.

<sup>198</sup> *Dormer v Meville Dundas & Whitson Ltd* 1990 SLT 186, 189 on s 3(2) of the 1940 Act, where it was also held that the creditor could not by his own action of suing the other tortfeasor late so as to destroy the contribution action of the claimant. The wording and content of the Scottish 1940 Act and the English 1935 Act were however sufficiently different so

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broadest view taken was that all that mattered was that the contribution defendant could have been sued in time in the past.<sup>199</sup>

This uneasy relationship was abolished with the Civil Liability (Contribution) Act 1978 and limitation of the underlying claim is therefore no longer a defence against a contribution claim,<sup>200</sup> unless this meant the extinction of the underlying right.<sup>201</sup> Whether the effect of the extinction of rights on contribution rights resulting out of cargo movements within the conventions of the Carriage of Air Act was appreciated when making these amendments is questionable – at least no discussion thereof can be found in the preparatory documents of the Law Commission. Noteworthy in this context is, however, that the Limitation Acts, exceptionally, provide for the extinction of rights in certain circumstances.<sup>202</sup> Neither seems a later report on Limitation of Actions in 2001<sup>203</sup> to shed light on this discussion. While it considered the effect of limitation, whether as a bar or as extinction of the right of action, and taking also into account the effect of extinction on contribution, it did not analyse the matters where extinction of action already curtailed contribution claims.

The effect of the many changes to the contribution and limitation provisions is, it seems, that even claims for contribution arising from claims for liability for damage under the air conventions as implemented into legal systems of the UK by the Carriage by Air Act 1961 are subject to the time limitation rules under the convention.<sup>204</sup>

This result may also seem to be in line with the case-law under the CMR where the CMR and its time bar is strictly applied between senders and carriers, even if all parties are carrier's themselves. Yet,

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that the difficulties of a judgment in favour of the other tortfeasor only by means of pleading limitation in the *George Wimpey* case did not emerge.

<sup>199</sup> *Morgan v Ashmore Benson, Pease & Co* [1953] 1 W.L.R. 418 at 420; *Fortes Service Areas v Department of Transport* of 18<sup>th</sup> July 1984, 1984 WL 988591, CA per Browne-Wilkinson LJ (and agreed by Dunn LJ): "To my mind the words in their plain meaning mean 'if sued at any time'; that is to say, if it is possible to point to any time at which an action by the plaintiff against the third party would have succeeded, that is enough to satisfy the requirements of the section."

<sup>200</sup> S 1(3) of the Contribution Act and see Law Commission Report, Law Com No 79 paras 25, 60 and 81(g), Working Paper no 59, paras 31-35 and Mitchell para 12.32. See also *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd (No.2)* [1987] 1 W.L.R. 1614, at 1621 and 1623, QBD; *Nottingham HA v Nottingham City Council* [1988] 1 W.L.R. 903 at 906 and 912; *CA and Societe Commerciale De Reassurance v Eras (International) Limited (formerly Eras (U.K.)) and Others (The Eras Eil Actions)* [1992] 1 Lloyd's Rep 570 at 601, CA.

<sup>201</sup> See also, without further discussion, Halsbury's Laws of England/Carriage and Carriers (Vol 7 (2015), Carriage by Air, International Carriage, para 165.

<sup>202</sup> See e.g. Limitation Act 1980, s 3(2) for the owner's title to a chattel which is extinguished after 6 years after its conversion and s 11A (3), where the tort victim's right to sue for damage caused by a defective product is extinguished after 10 years from the relevant time. In both cases there is an interest for finality.

<sup>203</sup> Law Com No 270 (2001) (HC 23) para 5.21: "In the Consultation Paper we provisionally proposed that no change should be made to the general rule that the expiry of the limitation period should merely bar the remedy. We explained that we could see no advantages in changing the present position, and that making 'extinction' the general rule could create difficulties, most notably in contribution cases. [FN: Limitation of Actions, Consultation Paper No 151 (1998), para 14.21.] Nor did we think that it would be practicable to change the position in relation to the exceptional cases where the limitation period extinguishes the right, so that a uniform rule of barring the remedy could be applied. In land-related claims and conversion, such a reform would undermine the claimant's title acquired on the expiry of the relevant limitation period. The position relating to the expiry of the 'long-stop' period under the Consumer Protection Act 1987 is governed by European law and is consequently outside the remit of this Paper." And see Limitation of Actions, Consultation Paper No 151 (1998), para 14.21: "...Moreover, we feel that making 'extinction' the general rule could create difficulties (notably in the case of actions for a contribution, where the limitation period for an action by the plaintiff in the original action against the defendant to the contribution action may have expired before the right to bring a contribution action has accrued). Our provisional view is that ... no change should be made to the present law on the effect of the expiry of a limitation period..."

<sup>204</sup> By reason of the Contribution Act s 1(3). Yet, a solution to exactly marry the limitation of the contribution claim with that of the main claim was seen as unsatisfactory by the Law Commission in their Working Paper No 59 "Contribution" at para 35, but a closing of the time gap as much as possible to force a timely contribution claim was suggested as a potential solution and comments were invited on it. This suggestion reminds, for example, of the solutions found in the sea carriage conventions where indemnity claims against third parties are allowed at least for a further 3 months (HVR art III r6bis) or 90 days (HambR, art 20.4, RR art 64, CMNI art 24.4), failing any more flexible provision of the relevant *lex fori*.



exceptionally, also under the CMR, recourse actions between carriers classed as successive carriers, benefit from a longer period.<sup>205</sup> Indeed, this additional period seems to have been a motivating factor in some jurisdictions for a wide interpretation of the notion of successive carriers the successive carrier regime in order to cover a wider range of carriers and bring their interactions into the extended time bar of section 39.4 CMR for recourse actions.<sup>206</sup>

In contrast, one may see in the provision in section 1(3) of the Contribution Act 1978 without reintroduction of a further stipulation in the Carriage by Air Act an intentional clarification that any extinction of rights under the air conventions is final, whether such a right of action was exercised by cargo or by other carriers for contribution or recourse. After all, the air conventions are strict and cannot be contracted out of,<sup>207</sup> thus, one may argue, clearly showing the mandatory nature of the convention rules. This interpretation might, however, be going beyond what was intended to be covered by the air conventions:

The Montreal Convention in articles 29 and 30 set out the convention's priority for claims only for damage sustained in case of death or bodily injury of a passenger, destruction or loss of, or of damage to checked baggage or of cargo.<sup>208</sup> However, contribution claims are specifically left untouched by the convention and a contribution claim is not a claim for damages due to such loss based on a carrier's liability for damage, but based on a right of recourse<sup>209</sup> to share in the cost of the loss. This is what the Montreal Convention in contrast to the earlier Warsaw Convention<sup>210</sup> clarified in its article 37<sup>211</sup> (and also in article 48 for the relationship between actual and contractual carriers),<sup>212</sup> that the convention only regulates the relationships between passenger, consignor and consignee towards the air carrier and vice versa. Third parties however are not included.<sup>213</sup> Indeed the stipulation in section 5 (2) of the Carriage by Air Act 1961<sup>214</sup> seems to be based on the assumption that contribution claims are not covered by the conventions,<sup>215</sup> otherwise the Act would be in breach of the convention rules and therefore the obligations of the UK under international law<sup>216</sup> to give effect to them.

Therefore, one may instead see the various changes in the Carriage by Air Act 1961 and Limitation Acts as an oversight of legislation due to the parallel reforms and consolidation of the Limitation Acts culminating in the Limitation Act 1980 alongside the development of the law of contribution from section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 to the Civil Liability

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<sup>205</sup> CMR art 39.4 with 32.

<sup>206</sup> Although this approach has been criticised as going beyond the legal framework of the CMR; see [above n.90](#).

<sup>207</sup> According to WC art 32 and MC art 49, a clause infringing the provisions of the convention is null and void.

<sup>208</sup> Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 at Introduction, para 43.

<sup>209</sup> See *South West SHA v Bay Island Voyages* at [20] referring to the US Court of Appeals for the Ninth Circuit in *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008), followed in *Allianz Global Corporate & Speciality v EMO Trans California Inc* 34 Avi 15,274 (ND Cal, 2010) the relevant entry in Shawcross and Beaumont, *Air Law*, Issue 142, September 2014, at paragraph 446.1, further referring to a Canadian decision in *Connaught Laboratories Ltd v Air Canada*, as well as the New South Wales Court of Appeal in *United Airlines v Sercel* [2012] NSWCA 24 all affirming the decision in Chubb. See also Shawcross and Beaumont, *Air Law*, Issue 145, June 2015, at paras 413, 446.1 and 463, 464 – 500, showing also that there are opinions to the contrary, and e.g. the French Court de Cassation in *Eureka Logistique v UPS* (court de cass, 20 Oct 2009) (2009) 63 RFDA 435 applied the 2 year limitation period also to recourse actions.

<sup>210</sup> But see the inclusion in art 30A in the Warsaw –Hague Convention in its version as amended by the Montreal Protocol No 4.

<sup>211</sup> See Shawcross and Beaumont, *Air Law*, Issue 145, June 2015, at paras 463, 464 – 500.

<sup>212</sup> The latter provision has its correlation in Art X of the Guadalajara Convention for the Warsaw regime.

<sup>213</sup> MüKo HGB-Ruhwedel, MÜ, art 37 para 2-3 and art 36 para 27 and *South West SHA v Bay Island Voyages* [20].

<sup>214</sup> Clarifying the convention's limitation provisions do not apply to contribution claims.

<sup>215</sup> Shawcross and Beaumont, *Air Law*, Issue 145, June 2015, at para 446.1.

<sup>216</sup> See Vienna Convention on the Law of Treaties (1969), arts 26 – 29.

(Contribution) Act 1978.<sup>217</sup> The amendments to the 1963 Limitation Act and consolidation into the 1980 Limitation Act might have simply been premised on the assumption that contribution arising from claims under the Carriage by Air Act fell within the same regime as the then section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935. It might also have been assumed that with section 5 of the Carriage by Air Act being repealed, limitation was brought all in line with the general rule and it might have been forgotten that the air conventions provide the extinction of the right at the point of limitation. However whether or not the disapplication of the convention rules on limitation in section 5(2) of the Carriage by Air Act 1961 with the suggested underlying intention as set out above is indeed sufficient to circumvent the explicit rule in section 1(3) of the Contribution Act will have to be tested in court.

### 4.5 Conventions on sea carriage and inland waterways

Sea and inland waterway carriage conventions have no specific system for successive carriers but most of these conventions systems, with the notable absence of the Hague and Hague Visby Rules, contain provisions on the liability of the actual carrier under the convention, the joint and several liability of the actual and contractual carriers, and cargo's rights of suit against either or both of them.<sup>218</sup> They also, as is the case in the Hague Visby Rules,<sup>219</sup> provide for an extended time bar for recourse claims: generally reference is made to the *lex fori*, but a minimum time beyond that of the underlying claim for damage under the conventions of 3 months or 90 days is provided.<sup>220</sup> Otherwise they seem to leave recourse actions to domestic law and this is explicitly pointed out in the Hamburg Rules.<sup>221</sup>

### 5. Effect of time bar provision

In the context of section 1(3) of the English Contribution Act it is noteworthy that the sea and waterway conventions, with the exception of the Hague and Hague-Visby Rules,<sup>222</sup> are all worded as time bars although the Rotterdam Rules explicitly allow reliance on the time barred rights to counterclaim and set-off, whereas the CMNI explicitly rejects such possibility.<sup>223</sup> Therefore no issues ought to arise here; as for the Hague-Visby Rules, it is submitted that its provision of article III rule 6bis must be applied as having priority over section 1(3) of the Contribution Act. Thus while under English law a 2 year time bar for contribution claims would generally apply, it seems that the effect of section 1(3) of the Contribution Act would be that while recourse claims under the Hague-Visby Rules would remain possible after "the discharge" of the underlying right, they would have to be brought no later than within 3 months from settlement or service of the claim form against the contribution claimant.

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<sup>217</sup> See Law Com No. 79 para 32.

<sup>218</sup> See HambR art 10, RR arts 19 and 20, CMNI art 4.

<sup>219</sup> Albeit not the Hague Rules.

<sup>220</sup> See HVR art III r6 bis, HambR art 20.4, RR art 64 and CMNI art 24.4.

<sup>221</sup> See HambR art 10.6 but contrast the CMNI which provides explicitly for the application of the convention rules between the contractual and the actual carrier, thus limiting the freedom to contract on other terms (CMNI art 4.1 and 25).

<sup>222</sup> See *Aries Tanker Corporation v Total Transport Limited* [1977] 1 WLR 185 (see in particular Lord Wilberforce at 188) and also *Henriksens Rederi A/S v Centrala Handlu Zagranicznego (CHZ) Rolimpex (The Brede)* [1974] QB 233, where it was held that cargo damage could not be relied on as defence or set-off or against freight claims and was extinguished after the time lapse; cf. *Goulandris Brothers Ltd v B Goldman & Sons Ltd* [1957] 2 Lloyd's Rep 207 Pearson J for a contribution claim under the York-Antwerp Rules.

<sup>223</sup> See RR art 62.3 and contrast CMNI art 20.5; no such provision is found in HambR art 20, seemingly leaving the matter to domestic law.

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In both the CMR and CIM limitation of time for suit is regulated with some detail, although both leave some matters regarding extension of the period of limitation or of some suspension and interruption issues to national law.<sup>224</sup> Although the conventions clarify that the right of action enshrined in them cannot be exercised by way of counterclaim or set off once limitation has occurred,<sup>225</sup> the provisions on limitation of time for suit are understood as a mere bar to the remedy, rather than as extinction of the right.<sup>226</sup> Indeed, CIM in its preceding article to the limitation of action prescribes the extinction of the right of action on acceptance of the goods without ascertainment of any loss or damage,<sup>227</sup> and thus shows by this distinction that limitation is not a matter of extinction of the right itself. This would be of importance if any recourse claims would be made under the Contribution Act, insofar as the Act would not be dis-applied in favour of the specific CIM convention recourse rules.

However where goods are carried by air under an applicable air carriage convention, the cargo claim is extinguished altogether by lapse of time.<sup>228</sup> As discussed above<sup>229</sup> this is likely to lead to the conclusion that due to the disconnect between the relevant section of the Carriage by Air Act 1961 and the Contribution Act, this means that a contribution claim based on such an extinguished cargo claim can equally be no longer made.

### 6. Conclusion

It is seen from the discussion on recourse rights that the interaction of domestic law with the conventions provisions can be challenging and that the piece-meal incorporation of conventions or amendments to implementing legislation without full regard of all the implications can prove to be hazardous to parties seeking recourse. Even if one system is understood, the next convention system seems to operate and interact with the English domestic contribution provisions in a different manner again. Time limitation for recourse actions thus stretch from no additional time to the underlying claim for damage in case of the air conventions, the CMR – insofar as recourse is outside its successive carrier rules – and the Hague Rules, to three months in case of the Hague Visby Rules, one year in CMR successive carrier relationships,<sup>230</sup> two years in other sea conventions<sup>231</sup> and to two or six years in case of CIM.<sup>232</sup>

While many of the multimodal forms or freight forwarder's standard conditions provide for a nine months' time bar<sup>233</sup> allowing the principal contractor a leeway of at last three months for recourse actions, this will only help a carrier seeking recourse so long as the cargo claimant cannot insist on the longer time bar under a mandatorily applicable transport convention.<sup>234</sup>

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<sup>224</sup> See CMR art 32.3 and CIM, art 48.5.

<sup>225</sup> See CMR art 32.4 and CIM, art 48.4.

<sup>226</sup> See Clarke para 43, CIM art 48 in contrast to art 47 and MüKo HGB, CMR, art 32 para 48 (Jesser-Huß).

<sup>227</sup> See CIM art 47.

<sup>228</sup> See Montreal Convention, art 35.1 and Warsaw Convention, art 25.

<sup>229</sup> See 4.4 c).

<sup>230</sup> Unless wilful misconduct introduces a 3 year period.

<sup>231</sup> Due to the application of the Contribution Act with its special time bar in s 10 of the Limitation Act 1980.

<sup>232</sup> Depending on whether the claim is seen as falling within the Contribution Act or instead under the CIM convention rules.

<sup>233</sup> See BIMCO's (The Baltic and International Maritime Council) COMBICON (Combined Transport Bill of Lading), revision 1995, cl 4; BIMCO's MULTIDOC (Multimodal Transport Bill of Lading), revision 1995, cl 4; FIATA's (International Federation of Freight Forwarders Associations) multimodal transport bill of lading form, cl 17; FIATA Model Rules for Freight Forwarding Services 2007, cl 10; UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No. 481), cl 10; BIFA STC (British International Freight Association Standard Trading Conditions), 2005A, cl 27 (B). *cf.* the one year time bar of NSAB (Nordic Association of Freight Forwarders) 2000 General Conditions, § 30.

<sup>234</sup> Where damage is localised and the forum treats the relevant transport convention as mandatorily applicable, irrespective of the multimodal nature of the contract; see for example the English case of *Quantum Corporation Inc v Plane*

Overall, conventions must be implemented appropriately and in case of clashes with domestic law, convention rules must be given priority. This principle, while giving a guideline, does not necessarily give clarity to the parties of a contribution claim. Thus any uncertainty in the law is complicating recourse for parties, even more so where there are likely several uncertainties due to the use of different transport methods. Therefore the disparate systems compounded by disparate implementation makes the use of true transport intermodality an even riskier business.

From an English law perspective it is recommended that, at least, the current uncertainty as to the interaction between COTIF-CIM<sup>235</sup> and the Contribution Act and the Warsaw and Montreal Conventions with the Contribution Act are removed.

It is thus recommended that the Railways (Convention on International Carriage by Rail) Regulations 2005 (COTIF Regulations) be amended to disapply the Contribution Act insofar as the COTIF-CIM Convention applies. Wording similar to that of the Rail Passengers' Rights and Obligations Regulations 2010 could be used for this purpose. However, in addition, the position on limitation of recourse actions should be clarified. After disapplication of the Contribution Act limitation would be six years. It is submitted that this is inappropriately long in the field of carriage where Convention limitation is only one year, with the exceptional grounds providing for two years.<sup>236</sup> The two-year solution from judgment of payment of the underlying claim, as in section 10 of the Limitation Act 1980, would seem more appropriate, but application of this provision would have to be clarified due to the provision's very limited scope, or a similar provision would have to be added to the 2005 COTIF Regulation. Incidentally such provision stipulating the time for limitation is also missing in the Rail Passengers' Rights and Obligations Regulations 2010, implementing the EU Passenger Rights Regulation. It is submitted that limitation should be aligned with the position chosen to apply under the COTIF Regulation, so as to avoid different timeframes for contribution claimed resulting from the carriage of passengers under CIV, depending on whether carriage takes place within or outside the EU.<sup>237</sup>

Equally section 5(2) of the Carriage by Air Act 1961 should be amended to re-introduce its initial version, setting a time bar for contribution actions arising out of air conventions' damages claims at 2 years from judgment or payment of the underlying claim. Additionally, to ensure its effectiveness, a further provision should be added insofar to dis-apply section 1(3) of the Contribution Act. If, however this was not be seen as an acceptable solution and that for policy reasons priority should be given to the finality of extinction provisions of the underlying claims, then sections 5(2) and (4) should be deleted, in order so as not to cause confusion.

Whether an alignment to a 2-year contribution time frame for other non-mandatory contribution regimes, such as that of the HVR is appropriate should also be considered. If the amendments as above were included, it is submitted, that such an alignment would be a positive step in unifying a disparate and haphazard system.

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*Trucking* [2002] EWCA Civ 350, [2002] 1 WLR 2678 for a mandatory application of the CMR to the international road leg of a multimodal contract under an air waybill.

<sup>235</sup> And also COTIF –CIV.

<sup>236</sup> And 3 years for claims for death or personal injury to passengers.

<sup>237</sup> The EU Regulation having priority over COTIF, see Art 2 of the Agreement Between The Intergovernmental Organisation For International Carriage By Rail And The European Union On The Accession Of The European Union To The Convention Concerning International Carriage By Rail (COTIF) Of 9 May 1980, As Amended By The Vilnius Protocol Of 3 June 1999 of 23<sup>rd</sup> June 2011.

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| Convention or system  | Successive carrier (SC) rules/ ( <i>Contractual and actual carrier</i> )   | Liability rules inter se  | Rules on time bar for indemnity or contribution  | Who can be sued by cargo and when?  | Who can be sued for recourse by other carriers and when?  |
|---|--|---|--|---|---|
| <b>CMR</b><br>arts 34 - 40  | Strict SC rules– all carriers carrying under same contract and by taking over the consignment note liable for complete transit (34)  | Carrier or carriers liable according to causality – otherwise according to share of carriage charge; all carriers cover for insolvent carrier (37 – 38)   | Suit to be commenced within one year from judgment or date of payment by carrier seeking recourse (39.4) | First, last and carrier in whose care event giving rise to damage occurred (36)   | All carriers in one forum at place of business of one of the SCs (39);<br>No requirement to sue all;<br><b>No prohibition of joinder</b> of actions   |
| <b>CIM</b><br>arts 26, 45, 50-52<br><i>art 27, 45.6</i>                     | Strict SC rules - all carriers carrying under same contract and by taking over the consignment note liable for complete transit (26);<br><br><i>Rules also for substitute carriage (joint and several liability) (27)</i>                    | Carrier or carriers liable according to causality – otherwise according to share of carriage charge; all carriers cover for insolvent carrier (50)  | N/A<br>No time period stipulated – left to <b>domestic law</b>   | Only first <b>or</b> last <b>or</b> carrier in whose care event giving rise to proceed's (45.1); choice of defendant carr. extinguishes right to choose (45.7) – no joinder of actions;<br><b>Alternatively,</b> suit possible also against substitute carrier (45.6) | Recourse claim must be made against all SC in same proceed's – or claim is lost (51.2);<br>Jurisdiction of court at place of business of one of the SCs (51.4);<br><b>Joinder</b> of recourse to cargo proceed's <b>NOT possible</b> (51.6) |
| <b>WS 1929 art 30 (and Guadalajara Conv. 1961) WS-H-MP4 arts30 &amp;30A</b> | SC Rules –all carriers part of contract to extent of their part of carriage; liable gen. only for own part of carriage, but jointly & severally liable for goods (30);<br><br><i>And actual carrier rules in Guadalajara Conv. 1961 (GC)</i> | Domestic law: Recourse rights betw. SCs not covered by Convs; left to domestic law; (30A WS-H-MP4)<br><i>Rights of recourse betw. actual &amp; contractual carriers explicitly not prejudiced by Guadalajara Conv; (X GC)</i> | N/A<br>No time period stipulated – left to domestic law  | Cargo claims: consignor against first carrier; consignee against last carrier and all against carrier in whose charge loss occurred (30.3);<br><br><i>Contr. or actual carrier or both (VII GC)</i>   | <i>Right to join other carrier as per lex fori (VII GC);</i>  |
| <b>MC arts 36- 37, arts 39 - 48</b>   | SC Rules - all carriers part of contract to extent of their part of carriage; liable gen. only for own part of carriage, but jointly & severally liable for goods (36);<br><br><i>AND actual carrier rules (39 – 48)</i>                     | Domestic law: Rights of recourse explicitly not prejudiced by MC (whether third parties, successive carriers or <i>actual/contractual carriers</i> ; 37 & 48)   | N/A<br>No time period stipulated – left to domestic law  | Cargo claims: consignor against first carrier; consignee against last carrier and all against carrier in whose charge loss occurred (36.3);<br><br><i>Contr. or actual carrier or both (45)</i>   | <i>Right to join other carrier as per lex fori (45);</i>  |



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|   |  |  |  |     |     |
|---|--|--|--|-----|-----|
| <b>HR</b>                                       | N/A  | N/A  | N/A  | N/A | N/A |
| <b>HVR<br/>art.III r.6 bis</b>                  | N/A  | N/A  | Time for commencing suit per lex fori, but no less than least 3 months from settlement by or service of claim against the carrier seeking indemnity (III r.6bis) | N/A | N/A |
| <b>Hamburg Rules<br/>arts 10 &amp; 11, 20.4</b> | <i>Joint and several liability of contr. and actual carrier (10.4), unless through carr.</i> | <i>Rights of recourse betw. carriers explicitly unaffected (10.6)</i>  | Time for commencing suit per lex fori, but no less than 90 days from settlement by or service of claim against the carrier seeking indemnity (20.4)              | N/A | N/A |
| <b>RR<br/>Arts 19 &amp; 20, 64</b>              | <i>Joint and several liability of contr. carrier and maritime perf. party (20)</i>           | N/A  | Time for commencing suit per lex fori, but no less than 90 days from settlement by or service of claim against the carrier seeking indemnity (64)                | N/A | N/A |
| <b>CMNI<br/>arts 4, 24.4</b>                    | <i>Joint and several liability of contr. and actual carrier (4.5)</i>                        | <i>Rights of recourse betw. carriers expl. unaffected (4.5);</i><br><br>Conv. liability rules also apply betw. contr. and actual carrier (4.1) | Time for commencing suit per lex fori, but no less than 90 days from settlement by or service of claim against the carrier seeking indemnity (24.4)              | N/A | N/A |

Table 2: comparison of conventions in their regulation of successive carriers and/or of actual & contractual carriers.